PUBLIC

Case No. 20160439-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

MICHAEL ALAN JORDAN,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for 4 counts of aggravated sexual abuse of a child, 4 counts of sodomy on a child, and 3 counts of forcible sodomy of a child, all first-degree felonies; 16 counts of sexual exploitation of a minor, all second-degree felonies; 1 count of tampering with a witness, and 4 counts of dealing in materials harmful to minors, all third-degree felonies, in the Third Judicial District, Salt Lake County, the Honorable Ann Boyden presiding

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INTRODUCTION

Michael Jordan sexually abused his stepsons [redacted] for more than five years. He also showed them pornography and took pictures of them naked, adding the photos of [redacted] to the collection of child pornography and sexually suggestive pictures of children found on his laptop. When [redacted] announced he was moving out on his 18th birthday, the abuse came to light, and Jordan began getting rid of incriminating evidence.

Defense counsel made a careful record as the case proceeded, documenting her unsuccessful efforts to establish that [redacted] The lack of evidence blocked her pursuit of a fabrication defense. Although [redacted] he identified no

evidence that would have proved the [redacted] Instead, he confirmed [redacted] Thus, he cannot show that counsel was ineffective.

In closing, the prosecutor argued that the jury could use "all of the evidence" before it to decide if Jordan took pictures of his naked and partially-nude toddler to sexually arouse himself. That included evidence of Jordan's sexual attraction to young nude boys. The argument did not misstate the law, the jury was accurately instructed on the issue, and defense counsel was not required to object. Moreover, counsel could conceivably have remained silent to prevent anticipated harm from providing the prosecutor a reason to address the matter in rebuttal and to re-emphasize her argument. Thus, Jordan cannot show that counsel was ineffective.

Jordan never claimed that anyone else had access to his laptop, and the record contains no evidence of its shared possession. Jordan cannot show either the fact or the scope of his counsel's investigation into the issue and identifies no evidence that counsel might have found with further investigation. Thus, he cannot show that counsel was ineffective.

Four of the salacious images showed unknown nude males, and the jurors were instructed that they could use their own life experience and common knowledge, together with the outward physical appearance of the

males and "all other evidence" before them, to decide whether the subjects in the images were under eighteen. That evidence did not include expert testimony, nor was such evidence required. There were, however, multiple photos of one of the minor victims in this case whose minor ages were established for each of the photos. There was sufficient evidence for the jury to find that the State had established beyond a reasonable doubt that all of the images depicted males under the age of eighteen. Further, the record does not reveal the existence or scope of defense counsel's investigation into an age expert; in any event, none was required because she did not have to prove that the images depicted males 18 or older. And Jordan cannot prove that all objectively reasonable counsel would have asked for an affirmative defense instruction. That instruction would have required the State to disprove that the boys were 18 or over. But the State already bore that burden because it had to prove that they were under 18. Objectively reasonable counsel could have chosen—as counsel did here—to argue to the jury that the State had not met that burden.

STATEMENT OF THE ISSUES

Issue 1. Has Jordan shown that his counsel was ineffective:

a. in her investigation into whether [redacted] and in her

decision not to file a rule 412 motion based on the investigation's result?

b. because she did not object to the prosecutor's argument that the State had proven exploitation because Jordan took two photos of a nude and partially nude young boy for the purpose of sexually arousing himself?

c. in her investigation into whether [redacted] had access to and used Jordan's laptop, and because she did not move for an order to require the State to show constructive possession of the images on the laptop?

Standard of Review. Ineffective-assistance-of-counsel claims raised for the first time on appeal are reviewed for correctness. *State v. Isom*, 2015 UT App 160, ¶34, 354 P.3d 791, *cert. denied* 364 P.3d 48.

Issue 2A. Did the State present sufficient evidence to permit the jury to assess the age of the unknown boys depicted in exhibits supporting four of the exploitation counts?

Standard of Review. When assessing the sufficiency of the evidence to sustain a jury verdict, this Court must "review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury." *State v. Brown*, 948 P.2d 337, 343 (Utah 1997) (quotation marks and citation omitted). So reviewed, evidence will not support a jury verdict only if it "is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime." *Id*. (quotation marks and citation omitted).

Issue 2B. Has Jordan shown that his counsel was ineffective because she did not:

a. use an expert to establish that the unknown boys depicted in four exhibits were not minors?

b. use the statutory affirmative defense that the boys were 18 or older so that the State would have to disprove that fact rather than rely on an argument that the State had not met its burden to prove that they were under 18?

Standard of Review. See Issue 1, *supra*.

Issue 3. Does the doctrine of cumulative error provide a basis for relief?

Standard of Review. None applies.

STATEMENT OF THE CASE

A. Summary of facts.

[redacted] abuse

In 2008, [redacted], a single mother of three, moved her family to Windsor Mobile Estates, a trailer park in West Valley City. R1323-24, 1396. Her oldest son [redacted] was 12; her youngest son, [redacted], was six. R1396-97.

Defendant Michael Jordan worked at his brother's appliance repair company and lived in the same trailer park. R1324, 1337, 1430-34. He met [redacted] first and started spending a lot of time driving him around in his truck, buying him expensive gifts, teaching him how to drive, and letting him sleep

over. R1324-27. He also taught him about sexual abuse and pornography. It began in Jordan's truck. R1327. The two were talking about penises, Jordan told [redacted] to pull down his pants, Jordan put his hand on [redacted] penis, then he pulled over and masturbated [redacted] *Id.* From there, the abuse grew to include mutual masturbation, oral sodomy, and anal sodomy. R1327-31, 1378-80.

[redacted] introduced his mother to Jordan when they were at church in 2009. R1395, 1397. The two wed in mid-2010 and had two sons. R1322-23, 1325, 1329, 1394-95, 1397. Jordan moved into Stacy's trailer and became a stepfather to her children. R1269-70. He also continued to abuse [redacted] In addition to the sexual abuse, Jordan showed [redacted] pornography on Jordan's laptop, showed him pictures of other naked boys and of Jordan's own genitals, took pictures of [redacted] when he was nude and partially nude, and had [redacted] send him pictures of himself with his genitals exposed. R1327-50. Some of the pictures included Jordan's hand wearing his wedding band. R1348-50, 1356-57, 1408-09. He also began to make [redacted] earn "gifts" with sexual activities. R1333, 1337.

[redacted] Abuse

[redacted] first saw Jordan masturbating when they lived at Windsor Mobile Estates.[1] R1271-72. He later caught Jordan doing it again after the family

[1] [redacted] is often referred to as [redacted] throughout the record. Both references are to the same youth.

moved to a house on Burningham Drive when he was almost eight. R1396-97, 1272. This time, Jordan had [redacted] masturbate both himself and Jordan. R1272-73, 1286. From there, it seemed to [redacted] that some form of abuse happened "[e]very other day" in the basement media room, [redacted] room, or his mother's bedroom. R1273-75, 1277-78, 1290, 1294. The abuse included mutual oral sodomy, mutual masturbation, and mutual anal sodomy with Jordan using his fingers, his penis, or a dildo. R1274-76,1280-81, 1299-1301. Sometimes during the abuse, Jordan would show [redacted] pornography on Jordan's laptop or offer him money. R1278-80, 1285, 1299-1300.

Jordan abused [redacted] for over five years. R1281, 1396-97. [redacted] did not tell anyone about the abuse because Jordan took him to the locked office in the basement, pulled a gun from a safe, and threatened to shoot [redacted] and his family if he told. R1283-84.

The unraveling

[redacted] endured the abuse until he was almost 18 years old. R1333, 1335, 1379, 1385. Before [redacted] 18th birthday, Jordan showed [redacted] pictures he had taken of himself as he sodomized [redacted] R1341-42, 1383-84, 1391. This act heralded the beginning of the end for Jordan. [redacted] was "devastated," and he had finally "had enough." R1342-43, 1391-92. In September 2014, [redacted] told

Jordan that he would be moving out on September 23, his 18th birthday. R1354-55.

Days later, on Sunday, September 21, Jordan was alone at the appliance repair company late at night and called police to report that his car had just been broken into in the parking lot, and his laptop had been stolen. R1424-26, 1434. The responding officer found the report and the circumstances "kind of odd," and police later called Jordan's brother Leonard and asked him to keep an eye out for Jordan's missing computer. R1427, 1434-38, 1441.

The next day—one day before [redacted] turned 18—West Valley Police received an anonymous call about a ten-year-old and his stepfather, prompting a welfare check at the Jordan house to check on [redacted] R1283, 1399-1401, 1417-19, 1448-49. Jordan told them [redacted] was fine, the police left, then Jordan left. R1282-84. [redacted] used the opportunity to tell his mom that Jordan had been abusing him for five years *Id.* Stacy called police and arranged to meet them away from the house. R1400-01, 1417-19. The police arranged for Stacy and the children stay somewhere else for the night. R1419-20.

Stacy took both boys for police interviews the next day and for medical exams within days thereafter. R1355-56, 1381, 1383, 1400-01, 1449. [redacted] told Detective Jaron Averett that a significant amount of abuse occurred in the media room of their current home and that the abuse included the use of

lubrication for anal penetration with a dildo while Jordan sat in a particular spot in that room. R1280-81.

Police also interviewed Jordan the same day. R266. He denied ever abusing the boys, showing the boys pornography, or taking naked pictures of them. R266-350, 1452, 1480-81. He claimed he was the "white knight" who married Stacy to [redacted], but that the marriage devolved into constant fighting. R266-350. He claimed that [redacted] R266-350, 1894. Jordan was arrested when the interview ended. R1454.

That same day, Detective Averett returned to the Jordan home to take pictures. R1454-55. Once inside, he noted that despite the unusually warm day, someone had lit a fire in the fireplace and attempted to burn packages of condoms, K-Y Jelly, and mail. R1454-57. Stacy told officers that the couple had not used condoms since 2010. R1403-04. Det. Averett also found that a computer that had been in the house the day before was missing. R1403, 1465-66. It was later recovered at the house of Jordan's friends. R1277, 1279, 1295, 1305, 1466. The detective located two laptops in the Jordan house—one

of which was in Jordan's locked office and both of which were missing their hard drives—a computer tower, a gun in a locked safe in Jordan's locked office next to the media room, and a bottle of lubricant on the floor next to the spot [redacted] had described in the media room. R1458-64, 1546-47.

Around October 7, Jordan's sister-in-law located the allegedly stolen laptop above a ceiling tile in the break room at the appliance repair company. R1434-38, 1441. The case included Jordan's personal computer, his picture nametag for the repair shop, mail reflecting his home address, and a "hotspot" device which allowed wifi access without an internet connection. R1436-38, 1470-73. But like Jordan's other laptops, it was missing the hard drive. R1545-46.

Leonard turned the computer over to the police, and a forensic search of the computer revealed a single registered and password-protected user account named "Michael." R1599-1601. It also revealed a large collection of child pornography and salacious images of minors with metadata dates between September 2013 and September 2014.[2] R1428-29, 1440-41, 1598-1635, 1658-76. The vast majority of the images had file paths related to "users, Michael" and included dates. R1598-1635, 1658-76. The only ones that did not

[2] The State uses the term "salacious images" for what the prosecutor termed "erotica" – "images of young, scantily clad males[.]" R122.

were images that had been deleted before being recovered during the search—their file paths could not be determined. *Id.* The search also revealed search terms that led to some of the salacious images found on the computer, such as "young boys, true model, true boy models, fun with boys[.]" R932. Finally, the search revealed that the computer had been synced with Jordan's iPhone. R1598-1635, 1658-76. The result was a file on the computer containing everything that had been on the iPhone, including voicemails to Jordan, pictures of Jordan and his children, and dozens of salacious images of minors and child pornography, much of it involving [redacted] *Id.* Police found nothing on the phone itself. R1478.

B. Summary of Proceedings.

The State charged Jordan with a total of 33 criminal counts: four counts of aggravated sexual abuse of a child, four counts of sodomy on a child, and four counts of forcible sodomy of a child, all first-degree felonies; 16 counts of sexual exploitation of a minor, all second-degree felonies; one count of tampering with a witness, and four counts of dealing in materials harmful to minors, all third-degree felonies. R234-45.

The court granted the State's *in limine* motion to admit under rule 404(b), Utah Rules of Evidence, 43 salacious images of minors and dozens of images of child pornography found on Jordan's laptop. R120-33, 501-02, 927-

28, 2771-72, 2778-79. The court also granted the State's motion to admit various search queries found on the computer that related to internet child sex sites. R120-33, 233. Finally, the court denied Jordan's motion to suppress statements he made during the last half of his police interview. R260-64, 472-74, 1035.

For 1.5 years, Jordan repeatedly rejected the State's plea offer. R1361-77. When he finally sought to accept it on the second day of testimony, the victims' family refused to agree. R1361-77, 1525-28, 1537, 1539-42.

Jordan did not testify and rested without calling any witnesses. The defense focused on the victims' credibility and the purported lack of corroborative evidence. R1795-1802. After deliberating less than 2 hours, the jury convicted him of all 33 counts as charged. R496, 1821-23.

At sentencing, Jordan claimed that the witnesses lied about "a lot of things," that Stacy "has a history of doing this," and that they had "a marriage made in hell." R1895-96. He insisted that "there was a lot of sexual perversion in that house," that he "was never home," and that he was never able to tell his side of the story. R1896-99.

The judge recognized that "this case is replete with aggravating circumstances" but that, despite "searching" the information before him, he had only two mitigating circumstances to consider, as well as the fact that

Jordan had not shown that he was "amenable to rehabilitation." R1901-03. He then sentenced Jordan to the statutory sentences for each of the 33 counts and made the following concurrent/consecutive determinations: counts 1-4 consecutive to each other; counts 5-6 consecutive to counts 7-8 and all four consecutive to counts 1-4; counts 9-12 concurrent to each other and consecutive to the prior counts; counts 13-27 concurrent to each other and consecutive to the prior counts; count 28 consecutive to all prior counts; and counts 29-32 concurrent to each other and to everything else. R1903-07.

Jordan timely appealed. R665-74.

SUMMARY OF ARGUMENT

POINT I. Jordan claims his counsel did not investigate whether [redacted] The record is clear that counsel investigated and reviewed the matter numerous times and attempted to obtain supporting evidence, but was unable to do so. The record does not establish that evidence favorable to the defense exists, and Jordan's own interview statements admit that [redacted] Thus, he cannot establish that his counsel was ineffective.

Neither can he establish that his counsel was ineffective for not objecting to the prosecutor's closing argument and not seeking a different

jury instruction concerning sexually exploitive material. Jordan mischaracterizes the closing remarks, which accurately argue that Jordan took two photos of his naked toddler showing the boy's genitals for the purpose of causing his own sexual arousal. The challenged jury instruction accurately supported the argument, requiring no correction by counsel.

Jordan also cannot show that his counsel was ineffective in her investigation into whether [redacted] had access to Jordan's laptop to prove nonexclusive possession and for not moving for an order requiring the State to show constructive possession of the images on the laptop. His interview statements do not suggest that [redacted] had access to the laptop, as Jordan claims, and the trial evidence showed that the laptop had a single registered user—"Michael"—with password-protected access and that only Jordan had the password. Further, without evidence of his shared possession of the computer, no order requiring proof of constructive possession was required.

POINT II. Jordan argues that because the State did not call an age expert witness at trial, there was insufficient evidence to establish that the unknown males depicted in four images were under the age of 18, as is required to establish sexual exploitation of a minor. The issue presents a question of fact for the jury, no expert is required, and the jury had not only its experience and common knowledge, but sufficient evidence with which

to make the determination. That evidence included multiple images of one of the two known minor victims at various identified ages during the time of the abuse.

Alternatively, Jordan argues that his counsel was ineffective in her investigation into an age expert and for not using one to establish that the unknown males were 18 or older. The record shows that counsel knew of such experts, but the record is insufficient to establish either the scope of her investigation or her reasons for not using an expert. There is no evidence in the record to show what such an expert would have testified to. There is likewise no basis in the record to show that the unidentified testimony would have so changed the evidentiary picture that its absence undermines confidence in the four exploitation convictions at issue.

Jordan alternatively argues that his counsel should have raised the statutory affirmative defense that the boys were 18 or older so as to force the State to prove that they were not. But the State already had to prove that they were not because it had to prove that they were under 18. Counsel legitimately chose to argue that the State had not met that burden. In any event, Jordan cannot establish prejudice. When the jury convicted Jordan, it necessarily found that the State had proved that the boys were under 18. The

jury therefore would have found that the State had proven that they were not 18 or older.

POINT III. Jordan also argues cumulative error. Because he has shown no error, the doctrine does not apply.

ARGUMENT

I.

ON THIS RECORD, JORDAN HAS NOT OVERCOME THE STRONG PRESUMPTION THAT HIS COUNSEL (1) MET HER OBLIGATIONS WITH RESPECT TO INVESTIGATING AND PURSUING THE POSSIBILITY OF EVIDENCE OF A [redacted], (2) PROPERLY CHOSE NOT TO OBJECT TO THE PROSECUTOR'S CLOSING ARGUMENT, AND (3) PROPERLY CHOSE NOT TO RAISE AN ISSUE ABOUT ACCESS TO THE PASSWORD-ENCRYPTED LAPTOP. ALSO ON THIS RECORD, HE HAS NOT SHOWN THAT ANY OVERSIGHT UNDERMINES CONFIDENCE IN ANY OF THE VERDICTS.

Jordan argues that his counsel was ineffective because, he says, (1) she did not adequately investigate or attempt to establish that [redacted]; (2) she should have but did not object when the prosecutor argued that the evidence that Jordan took two pictures of his nude and partially nude toddler to sexually arouse himself established the exploitation element for those pictures; and (3) she did not investigate and prove that he did not have sole access to the password-encrypted laptop or ask the trial court to order the State to establish

constructive possession of the pornographic and sexually suggestive images on it. Aplt.Br. 15-28.

Jordan has not shown that his counsel was ineffective in any respect.[3]

A. To prove ineffective assistance, Jordan must affirmatively demonstrate both deficient performance and prejudice.

To prove ineffective assistance, Jordan "has the difficult burden" of proving both that trial counsel performed deficiently and that he was prejudiced by the deficient performance. *State v. Tyler*, 850 P.2d 1250, 1259 (Utah 1993); *see also Strickland v. Washington*, 466 U.S. 668, 687, 690, 694 (1984). "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S. Ct. 1473 (2010).

Review of counsel's performance begins with "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 687-89. Defendant may rebut this strong presumption only "by persuading the court that there was *no conceivable tactical* basis for counsel's actions." *State v. Clark*, 2004 UT 25, ¶6, 89 P.3d 162 (emphasis in original) (quotations and citation omitted). Defendant cannot

[3] Jordan claims that his ineffective assistance arguments can be decided, and the case reversed and remanded, in part, based on the appellate record. Aplt.Br. 15, n2. In the alternative, he has filed a motion for a rule 23B remand to enable him to complete the record with evidence he asserts is necessary to establish his claims. *Id.*

overcome the presumption through the "absence of evidence[.]'" *Burt v. Titlow*, 134 S. Ct. 10, 17 (2013) (quoting *Strickland*, 466 U.S. at 689).

Because *Strickland* is grounded in reasonableness, it asks only "whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) (quoting *Strickland*, 466 U.S. at 690). Thus, counsel cannot be deficient merely because she did not consider and reject an objection or argument for strategic reasons. *See Bullock v. Carver*, 297 F.3d 1036, 1048 (10th Cir. 2002) (recognizing that attorney's ignorance of a claim or lack of strategic choice will not, by itself, demonstrate objectively unreasonable representation). Rather, to prove objectively unreasonable representation, a defendant must show that no reasonable counsel would have overlooked the objection or argument. *See Strickland*, 466 U.S. at 688.

Investigatory omissions do not necessarily constitute deficient performance. *See State v. Griffin*, 2015 UT 18, ¶33 (defense counsel "is not obligated to investigate every possible lead or present every theory of defense"); *Burke v. State*, 2015 UT App 1, ¶20, 342 P.3d 299, *cert. denied* 352 P.3d 106 (Utah). Counsel's duty is "to make reasonable investigations or to make a reasonable decision that makes particular investigations

unnecessary." *Strickland*, 466 U.S. at 691; *State v. Montoya*, 2004 UT 5, ¶24, 84 P.3d 1183 ("it is within counsel's discretion to make reasonable decisions regarding the extent to which particular investigations are necessary"). A decision not to investigate is reviewed "for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Menzies v. State*, 2014 UT 40, ¶183, 344 P.3d 581 (quotation omitted).

Assessing the reasonableness of an investigation requires a review of the information available to counsel at the time of the challenged conduct. *State v. Rasabout*, 2013 UT App 71, ¶38, 299 P.3d 625 (citing *Taylor v. State*, 2007 UT 12, ¶¶48-49, 156 P.3d 739), *aff'd* 356 P.3d 1258 (Utah 2015). And counsel's decisions on what to investigate depend "critically" on the "information supplied by" his client. *Strickland*, 466 U.S. at 691.

A defendant cannot prove *Strickland* prejudice merely by identifying unexplored avenues of investigation. Rather, he "must show not only that counsel failed to seek mitigating evidence, but also that some actually existed to be found." *State v. Taylor*, 947 P.2d 681, 687 (Utah 1997) (citation omitted). *See also State v. Gerber*, 2015 UT App 76, ¶14, 347 P.3d 852. He must further show that the omitted evidence undermines confidence in the outcome. *See*

State v. Ott, 2010 UT 1, ¶47, 247 P.3d 344; *State v. Price*, 909 P.2d 256, 265 (Utah 1995).

B. Jordan has not overcome the strong presumption that his counsel adequately investigated evidence that [redacted] or proven that there is any overlooked evidence so compelling that its absence undermines confidence in the outcome.

Jordan first argues that his trial counsel was ineffective because she allegedly failed to adequately investigate and seek to admit evidence establishing that [redacted].[4] Aplt.Br. 17-21. Claiming that his counsel knew of his fabrication claim and conceding that she conducted some investigation, Jordan claims that the effort was inadequate to justify a strategic decision not to pursue it further. *Id.* Jordan argues that his counsel would have discovered reports from the police or the

[4] In his fact statement, Jordan claims that "the record suggests that [redacted]" Aplt.Br. 6 (citing R278). The cited passage is in Jordan's police interview and reads, [redacted] R279. In contrast, Jordan's appellate argument does not mention [redacted] He argues only that [redacted]" Aplt.Br. 21. Hence, his argument, and the State's response, deal solely with [redacted] In any event, Jordan's unsworn police interview demonstrates neither deficient performance nor prejudice regarding [redacted]

Department of Child and Family Services [DCFS] which would have [redacted] *Id.* That evidence would have been admissible under rule 412, Utah Rules of Evidence, he argues, and would have allowed him to pursue his "primary defense": a claim that his ex-wife fabricated the charges to gain an unspecified advantage in their impending divorce. *Id.* at 16-17, 21-28.

Jordan's argument lacks record support; in fact, the record contradicts it. The record shows that counsel knew of Jordan's allegations and [redacted] revisited the matter several times prior to trial, and, based on her investigation and expertise, reasonably decided that she did not have the evidence to support the theory. And the record does not show that there is any evidence of [redacted] compelling that its absence undermines confidence in the outcome. Accordingly, Jordan has not met his burden to show either deficient performance or prejudice.

1. The record shows adequate investigation into evidence that [redacted] and reasonable trial strategy in not pursuing it further.

Jordan admits that his counsel conducted some investigation but argues that the investigation was inadequate because, although counsel knew of his fabrication defense and of the alleged existence [redacted]

[redacted], she did not produce either police or DCFS reports on those allegations. Aplt.Br. 15-21.

The record shows that Jordan's counsel knew about and investigated his claim that [redacted] did not pursue the matter further. Defense counsel was attentive to establishing a complete record of her efforts, however, and that record shows both an adequate investigation and a reasonable trial strategy, defeating Jordan's ineffectiveness claim.

Before the preliminary hearing, defense counsel was aware of Jordan's police interview, in which he claimed that Stacy fabricated the charges against him and coerced her children into helping her. R266-350, 1036, 1066. Counsel also knew of a "[redacted] R771. At the preliminary hearing, counsel explored the issue by [redacted]" R763. The question drew an objection, and the judge prohibited further questioning on the matter. R763-64.

Counsel thereafter continued to investigate, as shown by her comments at a pre-trial hearing six months later. Counsel indicated that she might request a hearing on the issue of [redacted], but explained that "It's not likely to happen because I have witnesses

who are not cooperating." R904. After she noted that she would file the motion if she could "round up the witnesses[,]" the prosecutor reminded counsel that the deadline for filing the motion was that very day. R904-05. Defense counsel then stated, "what I'll do is I will file it, and I may withdraw" it. R905. She filed a written motion under rule 412, Utah Rules of Evidence, that same day to preserve her ability to pursue it should she succeed in her on-going efforts to get the necessary evidence. R1923. The motion specified that [redacted] *Id.* It also indicated that the "allegations were the subject of a DCFS investigation and a potential juvenile court case" but did not otherwise elaborate on either possible information source. *Id.* Clearly, counsel was aware not only of potential witnesses, but of potential official avenues of investigation. One week later, defense counsel withdrew the motion, explaining that [redacted]" R2767. Thus, counsel continued to investigate after filing the motion but saw no beneficial results.

Four months later, defense counsel filed a motion seeking to suppress statements Jordan made during the last half of his police interview, arguing that they were obtained in violation of Jordan's mid-interview attempt to invoke his right to counsel. R260-353. The judge denied the motion at a

hearing held the Friday before trial. R1035. The discussion then turned again to rule 412 evidence, with the prosecutor voicing concern about the admission of the evidence at trial given its pervasive presence in Jordan's interview. R1036, 1066. Defense counsel stated that she was "not sure" if Jordan would be testifying at trial because she hadn't yet talked to him about it, but that if he did not testify, the 412 "issue would be moot[.]" R1037. She went on to explain: "I will speak with him further if he is going to testify. I've done a million 412 hearings. And so, if I don't bring up a 412 hearing, it's because I think that we wouldn't be able to prevail on a 412 hearing. And that would be the only reason. And so I will look at that, and if I believe that we will prevail, I will talk to my client about that and discuss our options with regards to that." R1037-38. The judge voiced her willingness to consider an untimely rule 412 motion, to which defense counsel stated, "I don't anticipate trying to have this introduced. I'm very familiar with 412, and all the case law. If I look at it *one more time* and something stands out at me, I think I have an obligation to file something. I do not anticipate that…" R1038-39 (emphasis added). After the judge urged both counsel to revisit matters with their clients and witnesses, defense counsel once again assured the judge, "I will look at it *one more time* this weekend. If I feel like I'm going to do it, I will

let [the prosecutor] … know, but—but again, I don't anticipate that." R1039-41 (emphasis added).

This exchange demonstrates two things. First, it shows that defense counsel was fully aware of the potential to use [redacted] and the need to develop evidence to support it.

Second, it reveals that counsel had already investigated and had unearthed no support for the theory independent of what Jordan reported and presumably would have testified to, inasmuch as the issue would be moot if he did not testify. R1037. However, defense counsel had grave concerns about using Jordan's testimony and voiced those concerns in an in-chambers discussion just before the suppression hearing. R1052-55, 1066-68. They were again discussed the first day of trial in conjunction with rule 3.3, Utah Rules of Professional Conduct, and the professional obligation not to knowingly elicit false testimony. R1052-53. Defense counsel then clarified that she had decided to advise Jordan not to testify, but that if he took the stand against her advice, she would not elicit anything she believed to be "perjured testimony." R1054-56. She also recognized that despite her efforts, they may "have to deal with this again." R1055-57.

When the discussion turned to the prosecutor's continuing concern about rule 412 testimony, defense counsel further clarified that much of what

Jordan wanted her to prove was "not admissible." R1058-59. Among the examples she gave were the prior allegations of sexual abuse, which she explained would not be admissible because:

> [redacted] And I was, you know, pretty much shut down."
>
> THE COURT: And just for the record, is that the [redacted]?
>
> [DEFENSE COUNSEL]: Yeah, that's the [redacted]…The [redacted] *I definitely would've had a 412 hearing, but because* [redacted]*, then it's not admissible.*

R1058-59 (emphasis added). Counsel went on to stress that she had engaged in multiple conversations with her client that dealt with the inadmissible evidence, that she had "advised him many, many times" about what was not coming in, that she would again review with him "what he can and he can't say" should he insist on testifying, and that, should he decide to testify, counsel would let the prosecutor "know immediately so we can do some research on how we would proceed." R1060-63.

Finally, defense counsel reiterated for the court that she "looked at all of the evidence in the case," checked the case law, and, in her "professional

opinion," chose not to pursue the sexual abuse allegations because the evidence would be inadmissible. R1065-66.

This evidence makes clear that counsel knew of and investigated Jordan's fabrication claims before deciding not to pursue them at trial.

Jordan ignores much of this record evidence and argues that the inadequacy of counsel's investigation is shown, in part, by: (1) her attempt to suppress his police interview instead of recognizing its [redacted] (2) the prosecutor's purported concession that [redacted]; and (3) the fact that counsel filed no rule 412 motion although the trial court "directed her" to do so. Aplt.Br. 19-25. None of these arguments accurately represents the record.

First, Jordan misstates the scope of the motion to suppress. Defense counsel sought only to suppress "certain statements" from Jordan's police interview: those occurring after he "requested an attorney." R261, 353. Counsel argued that Jordan requested counsel at page 45 of the 85-page transcript. R261. Jordan cites to nothing after page 45 of the interview as support for the fabrication defense. *See* Aplt.Br. 15-28. He therefore has not proven that counsel mistakenly attempted to exclude anything that would have supported a defense.

Second, the prosecutor neither "acknowledged" nor "concede[d]" the [redacted] Aplt.Br. 6, 18, 22. Jordan points to a sidebar at the preliminary hearing when the prosecutor, speaking of [redacted], said, "Well, I think [redacted]" R763. [redacted]

Third, at no time did the trial court "direct" defense counsel to file a 412 motion. Aplt.Br. 18,21. The record citations from Jordan reflect (1) the court's belief that the subject matter was more appropriate for a motion than a preliminary hearing, although rule 412 may not be the appropriate basis; and (2) the judge's comments that she would consider such a motion, even if untimely, if it were filed, and that both counsel needed to talk with their respective clients and witnesses to ensure that they "are proceeding according to the rules of law and to the specific … rulings I've made in this case," not just on this matter. R1039-41. Thus, there is no evidence that defense counsel ignored a direction by the trial court or disagreed with the trial court on whether the evidence would have supported a rule 412 motion.

Finally, as shown in subsection B(2), *infra*, Jordan's own interview statements admit the truth of [redacted] and

demonstrate no reasonable likelihood that further investigation would uncover written documentation [redacted] Thus, counsel could reasonably have decided that further investigation into [redacted] would be fruitless or possibly harmful.

In sum, the record evidence leading up to trial amply demonstrates that defense counsel knew of and adequately investigated potential evidence to support a fabrication defense [redacted] Over the course of several months, counsel located potential witnesses and possible sources of official records, and tried repeatedly to obtain evidence to support the theory, but without success. Left only with the possibility of Jordan's testimony, she strategically chose not to use it. R1054. Not only did her investigation provide no useful evidence, but it supported a strategic decision not to pursue further investigation. *See Burke*, 2015 UT App 1, ¶¶21-23. Jordan's claim fails for this reason alone. *See Strickland*, 466 U.S. at 697 (court need not address both deficient performance and prejudice if defendant makes an insufficient showing on one).

2. Jordan has failed to prove prejudice.

To prove Strickland prejudice, Jordan "'must demonstrate a reasonable probability that further investigation would have yielded sufficient information to alter the outcome of his [trial].'" *State v. Price*, 909 P.2d 256,

265 (Utah 1995) (quoting *Parsons v. Barnes*, 871 P.2d 516, 523-24 (Utah 1994)) (alteration in *Price*). In other words, he must show that favorable evidence "actually existed" and that it would undermine confidence in the outcome. *See Taylor*, 947 P.2d at 687; *see also Ott*, 2010 UT 1, ¶47; *Gerber*, 2015 UT App 76, ¶14. Because Jordan does no more than speculate as to the existence and relevant content of reports and documentation, he cannot establish the requisite prejudice for his ineffective assistance claim, and the claim fails. *See Price,* 909 P.2d at 265 (presentation of defendant's own self-serving statement, without more, does not establish that additional investigation would have revealed information which is reasonably likely to have altered the outcome of his trial, defeating his ineffectiveness claim).

Jordan's insistence that further investigation would have adduced favorable evidence is entirely speculative and largely contrary to the record evidence. He has not attempted to refute defense counsel's representation that she had no testimony from witnesses independent of Jordan [redacted]. He has not argued that counsel should have called him to testify about such accusations, or that his testimony would have been admissible.

Instead, he argues that counsel should have relied on DCFS and police reports to prove the alleged [redacted]

[redacted]. He cites three sources to support his argument that these documents exist: 1) counsel's written 412 motion (R1923); 2) his own statement at sentencing (R1895); and 3) his police interview (R278) (all in Add. B). Aplt.Br. 18-24.

But even if those sources proved the documents' existence, Jordan does not show that they would have been admissible. And if they were not, they could not have changed the outcome. *Taylor*, 947 P.2d at 687.

In any event, he has not proved that the actual documents exist or that they contained evidence that, if admitted, would have created a reasonable probability of a more favorable outcome. *Id.*

Written rule 412 motion. Defense counsel's rule 412 motion stated that [redacted]." R1923. At best, the statement simply demonstrates defense counsel's knowledge of potential sources of information she intended to investigate. But the possibility of "[redacted]" does not establish the existence of [redacted], let alone [redacted]. The existence of a [redacted] implies a file's existence, but says nothing about whether the file's content would be favorable to Jordan. The fact that counsel thereafter investigated and reviewed the evidence with an eye toward pursuing [redacted]

[redacted] but did not produce or rely on such evidence and was [redacted] strongly suggests that the contents of any file she found were unfavorable—a fact supported by Jordan's interview statements, as noted below. It does not show that favorable evidence "actually existed to be found" or that it would have undermined confidence in the outcome. *See Taylor*, 947 P.2d at 687.

Sentencing statement. Jordan claims that at sentencing he explained that there was "[redacted].'" Aplt.Br. 19 (quoting R1895) (bracket in Aplt.Br.). He was not, however, [redacted] At sentencing, Jordan said that "there's [redacted]" R1895 (emphasis added). The statement would not have alerted counsel to the existence of reports showing the [redacted] nor demonstrated that such information was available to defense counsel during her pre-trial investigation. *See Rasabout*, 2013 UT App 71, ¶38 ("we look to the information available to trial counsel" at the time of the challenged conduct to determine the reasonableness of an investigation) (quoting *Taylor*, 2007 UT 12, ¶¶48–49).

Jordan's police interview. Jordan's interview statements do not mention the content of any [redacted] and no such reports are contained in the record. Jordan simply speculates that the reports, together with his interview statements, prove by a preponderance of the evidence that [redacted] in the past. Aplt.Br. 19-22. Speculation is not enough to prove the *Strickland* prejudice element. *See State v. McNeil*, 2013 UT App 134, ¶26, 302 P.3d 844 ("'[P]roof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality.'") (quoting *Allen v. Friel*, 2008 UT 56, ¶21, 194 P.3d 903) (additional quotation omitted), *aff'd* 365 P.3d 699 (Utah 2016). That failure alone defeats his claim. *See Rasabout*, 2013 UT App 71, ¶45.

Moreover, the interview statements show that favorable content in any documentation is highly unlikely. As to [redacted]—Jordan's statements admit that [redacted] Jordan stated that he and Stacy found out that [redacted]" R274. [redacted]

." R301-02.[5] According to Jordan,

R329.

" R279 (emphasis added). He further stated that their legal case "hit a brick wall" because they "

" R278. And even later,

R323, 327. Based on his statements, counsel had no reason to believe that would contain any evidence that

As for Jordan talked to police about two sets of allegations. First, he reported that when he first met Stacy,

R272-73.

R273-74. But in the end, he said, "

R274. As police drop investigations for any

[5] The reference to the R274, 278, 301, 314, 323, 327.

number of reasons, nothing in his statements suggest that any of the documentation of these claims would have proved that [redacted] *See* R278 (police also "dropped" the valid case against [redacted]).

Second, Jordan reported that after the investigations were dropped, Stacy started [redacted] R278-81, 303, 309-10. He did not suggest that the "[redacted] about the abuse, making it unlikely [redacted] exist to demonstrate that the [redacted]" R313-14. [redacted] Jordan told police that the second set of [redacted] occurred after a year and a half of therapy [redacted], Jordan admits, [redacted] R274, 277, 303, 313-14, 338. Even if the records would have shown that [redacted] that would not have proven that [redacted] R280, 303.

On this record, it is even less likely that any would have Defense counsel knew of , but still backed down from the R1058-59. This suggests that

Further, to prove prejudice, Jordan must account for all the other evidence in the record. He utterly fails to do so. Evidence that , one of which included the claim that Jordan showed Jordan filled his password-encrypted computer with naked pictures some of which included his own hand and many of which came from his iPhone. He falsely reported that that computer had been stolen from his office parking lot when it actually had been secreted in a ceiling tile in the office break room. All the hard drives on Jordan's computers were missing. reported that Jordan took him into Jordan's office, pulled a gun from a safe, and threatened with the gun if . ever reported the abuse. Police found a gun in a safe in Jordan's locked office. Police also found lubricant in the media room were

Jordan has not proved that counsel had [redacted] sufficient to overcome this evidence.

On this record, Jordan has not met his burden to prove *Strickland* prejudice to a demonstrable reality.

C. Jordan has not shown that trial counsel was ineffective for not objecting to the prosecutor's closing statement about sexually exploitive images or for not requesting a different jury instruction.

Jordan next argues that his counsel should have objected to the prosecutor's closing remarks and should have requested a different jury instruction regarding sexually exploitive material. Aplt.Br. 29-33. He claims that the prosecutor misstated the law when he argued that two photos of one of the two sons Jordan had with Stacy "were sexually exploitative merely because they were found on Mr. Jordan's computer." *Id.* at 29. Jury instruction 62, he argues, "[r]ead alone," impermissibly allows the jury to credit the prosecutor's erroneous argument. *Id.* at 31-32. Not challenging these statements, he claims, made it reasonably likely that the jury applied an "incorrect and harsher legal standard" in its evaluation of the two exhibits. *Id.* Jordan has not shown either deficient performance or prejudice.

To succeed, Jordan must first demonstrate that all reasonable counsel would have lodged an objection to the prosecutor's closing comments. *Strickland*, 466 U.S. at 688. He cannot do so on this record.

To find Jordan guilty of sexual exploitation based on the two photographs at issue, the jury had to find that they depicted "nudity or partial nudity for the purpose of causing sexual arousal of any person[.]" Utah Code Ann. §§76-5b-103(1)(b), 103(10)(f) (West 2015); Utah Code Ann. §201(1)(b) (West Supp. 2017) (both in Add. A).

The prosecutor focused the jury on the reasons Jordan took and kept the photographs. R1790-91. Jordan argues that the proper focus of this element is on the images themselves, not their possessor. Aplt.Br. 29-30. To that end, he argues, the Utah Supreme Court has adopted the federal six-factor *Dost* test to assess whether photographs are "sexually explicit" or depict nudity "for the purpose of causing sexual arousal of any person." *Id.* at 30-31 (referencing *State v. Bagnes*, 2014 UT 4, ¶42, 322 P.3d 719 and its adoption of the test in *United States v. Dost*, 636 F.Supp. 828, 832 (S.D. Cal. 1986)). Applying those six factors to this case, he argues, shows that neither of the pictures were sexually explicit. *Id.*

Jordan misstates Utah law. First, *Bagnes* adopted the *Dost* test to interpret or define the concept of "lascivious exhibition"—a term included in a subsection of sexually explicit conduct not at issue in this case. *Bagnes*, 2014 UT 4, ¶30-32. Moreover, *Bagnes* recognized that *Dost* did not establish a

"rigid test" but simply identified "a range of factors relevant to the inquiry[.]" *Id.* Thus, even *Bagnes* recognizes that *Dost* does not end the inquiry.

Second, and more relevant to this case, the Utah Supreme Court expressly invoked the *Dost* factors to be only generally "relevant" as being "helpful … to a determination that material depicts a 'nude or partially nude minor for the purpose of sexual arousal of any person.'" *State v. Morrison*, 2001 UT 73, ¶¶18-20, 31 P.3d 547 (in Add. C). This is so because Utah's statute does not directly parallel the federal statute and renders some of the factors inapplicable to that particular assessment. *Id.*

The supreme court also recognized that the factors are "'neither comprehensive nor necessarily applicable in every situation.'" *Id.* (quoting *United States v. Amirault*, 173 F.3d 28, 32 (1st Cir. 1999)) (emphasis omitted). The Court stressed that "'*there may be other factors that are equally if not more important* in determining whether a photograph [is designed "for the purposes of sexual arousal of any person."] The inquiry will always be case-specific.'" *Id.* (quoting *Amirault,* 173 F.3d at 32) (emphasis and alteration added in *Morrison*).

Further, the *Morrison* Court stressed that criminal liability under the part of the sexual exploitation statute at issue here turns not on the "purpose in *possessing* the material, but, rather, on the purpose for which the nude or

partially nude minor was *depicted*." *Id.* at ¶12 (emphasis in *Morrison*). If the "possession was knowing, and the nude or partially nude minor was depicted 'for the purpose of causing sexual arousal of any person,'" … a defendant may properly be subject to criminal liability." *Id.*

There was no clear law proscribing an argument that it was reasonable for the jury to infer that the purpose behind both depictions may be determined by the person who both took and possessed the images: Jordan. Without such a clear proscription, counsel could not have been deficient for declining to object. *State v. Dunn*, 850 P.2d 1201, 1228-29 (Utah 1993).

And under Utah law, an objectively reasonable attorney could conclude that the prosecutor's closing argument properly urged the jury to take into account the singular identity of the photographer and the possessor in determining whether the photographs were taken for the purpose of the sexual arousal of any person. She argued that when the jury used its common sense and its experience and reviewed the two images "in light of all of the evidence … presented in this case," it could infer that Jordan "wasn't taking a picture of his son because he's cute…. He was doing it because it's child pornography" and "because he wanted a picture of a naked little boy … [b]ecause he's sexually attracted to boys." R1790-91. As the 33 convictions suggest, the evidence established Jordan's sexual attraction to young nude

boys. The jury could reasonably infer that Jordan's attraction to young boys played a part in the purpose for which the boys were depicted in pictures Jordan both took and kept. *See Morrison*, 2001 UT 73, ¶12. *See also State v. Workman*, 852 P.2d 981, 988 (Utah 1993) ("Although Kelly did not testify that he took or possessed the picture for the purpose of arousing himself, I think a jury could reasonably draw that inference under the facts of this case, given Kelly's unusual physical attraction to" the victim) (Howe, Assoc. C.J., concurring in result) (carrying majority of Court).

Because the jury is permitted to consider that the photographs of a nude and partially nude young boy were taken by Jordan for the purpose of his own sexual arousal, the prosecutor was free to urge the jury to draw that inference. And because the argument did not misstate the law, counsel could reasonably forego making an objection to the prosecutor's argument. *See State v. Whittle*, 1999 UT 96, ¶34, 989 P.2d 52 ("[T]he failure of counsel to make motions or objections which would be futile if raised does not constitute ineffective assistance.") (quotation and citation omitted).

Jordan's challenge to jury instruction 62 is equally meritless because the instruction is entirely in keeping with the Supreme Court's interpretation of the definition of sexually explicit conduct at issue herein. The instruction provides:

> Determination whether material violates sexual exploitation of a minor:
>
> …
>
> (2) It is not an element of the offense of sexual exploitation of a minor that the material appeal to the prurient interest in sex of the average person nor that the prohibited conduct need be portrayed in a patently offensive manner.

R555 (in Add. C). In other words, "the material at issue need not be legally obscene." *Morrison*, 2001 UT 73, ¶8, n4. Jordan argues that, "[r]ead alone," the instruction supports what he called the prosecutor's "legally incorrect standard" of finding the material to be sexually explicit because it was possessed by a pedophile. Aplt.Br. 29, 32-33. Instead, the instruction is an accurate statement of the law and cannot support an "incorrect standard" when none was presented. *See* argument, *supra*. Accordingly, defense counsel was not required to object. *See Whittle*, 1999 UT 96, ¶34. Jordan has not, therefore, rebutted the strong presumption that his counsel reasonably chose not to object. *See State v. Kennedy*, 2015 UT App 152, ¶50, 354 P.3d 775, *cert. denied* 364 P.3d 48.

But even if the prosecutor's argument was technically objectionable, the Sixth Amendment does not require counsel to object to every inaccuracy in a closing argument. *See State v. Thompson*, 2014 UT App 14, ¶71, 318 P.3d 1221 (recognizing that some "instances of prosecutorial misconduct, standing

alone, may not have required an objection from trial counsel"). When counsel does not "object to a prosecutor's statements during closing argument, the question is 'not whether the prosecutor's comments were proper, but *whether they were so improper* that counsel's only defensible choice was to interrupt those comments with an objection." *State v. Houston*, 2015 UT 40, ¶76, 353 P.3d 55 (quoting *Bussard v. Lockhart*, 32 F.3d 322, 324 (8th Cir.1994)) (emphasis in original). One reason counsel can reasonably decide not to object to "improper" closing argument is to avoid "emphasiz[ing] the negative aspects of the case to the jury." *West Valley City v. Rislow*, 736 P.2d 637, 638 (Utah App. 1987).

Here, counsel could have reasonably concluded that objecting to the prosecutor's alleged misstatement would have given the prosecutor another opportunity to clarify his argument in a way that would have ended up in the same place and allowed the prosecutor to again emphasize why the jury should infer an inappropriate purpose behind the two depictions. Defense counsel could have reasonably decided that this clarification would have been more harmful than helpful or that the brief arguments—largely composed of verbally describing the depictions—were sufficiently short and isolated as to be minimally inflammatory. *See State v. Clark*, 2014 UT App 56, ¶34, 322 P.3d 761 (holding that prosecutor's improper remark during closing

argument "was harmless beyond a reasonable doubt because it was a singular, isolated statement and was not the focus of the prosecutor's argument").

In short, because a conceivable strategic reason supports counsel's decision not to object to the prosecutor's closing argument, Jordan has failed to rebut the strong presumption that his counsel performed reasonably. *See id.* at ¶6.

D. Jordan has not shown that trial counsel's investigation into evidence of whether and to what extent one victim may have had access to Jordan's laptop was constitutionally deficient. He also has not proven that the evidence existed to prove that the victim had access to the laptop, and the record shows that the State could have proven constructive possession.

Jordan argues that his trial counsel rendered ineffective assistance because she did not investigate and present evidence that "[redacted] had full access" to Jordan's computer.[6] Aplt.Br. 33-36. He further claims that counsel was ineffective for not seeking an order requiring the State to show constructive possession of the laptop images. *Id.* at 36-37. Jordan does not prove either claim.

[6] In addition to the testimony at trial, Jordan acknowledged ownership of the computer in his police interview. R319.

1. Jordan's speculative claim of inadequate investigation cannot establish counsel's ineffective assistance.

Jordan argues that his trial counsel did not investigate whether [redacted] had access to his laptop, apparently to suggest that [redacted] police found there. Aplt.Br. 33-40. Pointing only to his police interview, he asserts not only that [redacted] "had full access" to his computer, but that [redacted] *Id.* at 33-34, 40.

But the places in the report he relies on fail to support his sweeping statements about [redacted] access and actions, and fall short of giving counsel enough information to trigger a duty to investigate [redacted] access. In the two pages he cites, Jordan reported that (1) Jordan looked at pornography in a room with the door closed and in his truck when the children were absent; (2) "there was a time or two" when Jordan and [redacted] were working, and [redacted]; and (3) Jordan took pictures with his phone of "his computer" when "[h]e had some porn windows open." R314-15 (in Add. D).

Jordan's solo use of his own computer says nothing about [redacted] access to it. Their [redacted] does not even specify if a computer was used, let alone suggest that it was Jordan's computer and that [redacted] entered Jordan's password and accessed Jordan's account. And even assuming that

the unidentified "he" and "his" in the third comment above refers to [redacted], it refers to [redacted] computer, not Jordan's. Nothing about these statements would have given defense counsel any reason to suspect that [redacted] had downloaded the pornography found on Jordan's password-encrypted computer. R299, 315-18.

And even if Jordan's statement to police were enough to impose on all objectively reasonable counsel a duty to investigate further, Jordan cannot prove on this record that counsel failed in that duty. The record is silent about what counsel did or did not do about this issue. Counsel most likely would have asked Jordan whether [redacted] had access to his computer. And Jordan's responses would have been critical to determining what counsel should have done. *Strickland*, 466 U.S. at 691. But again, the record is silent on these points. On a silent record, the presumption stands. *See Titlow*, 134 S. Ct. at 17.

Moreover, [redacted] testified that Jordan's computer and phone were password-protected and that only Jordan had the passwords. R1341. The record includes no evidence that all objectively reasonable counsel could and should have used to show the contrary.

Neither can Jordan establish the requisite prejudice. Again, to do so, he must "demonstrate a reasonable probability that further investigation would have yielded sufficient information to alter the outcome." *Parsons v. Barnes*,

871 P.2d 516, 523-24 (Utah 1994). Because he identifies nothing that an investigation might have uncovered, his purely speculative claim fails. *Gerber*, 2015 UT App 76, ¶14 (where Gerber failed to "'bring forth the evidence that would have been available in the absence of counsel's deficient performance,'" his claim remained entirely speculative and failed to demonstrate prejudice) (quoting *State v. Lee*, 2014 UT App 4, ¶12, 318 P.3d 1164).

Jordan further argues that had his counsel conducted the necessary investigation, the resulting evidence of nonexclusive control of the laptop would have (1) required that the State prove his constructive possession of the child pornography and salacious images on the computer; and (2) provided a valid argument against admitting the salacious images and search terms from the laptop. Aplt.Br. 37. The claims are premised on discovery of evidence Jordan does not identify and, hence are wholly speculative.

As Jordan establishes neither deficient performance nor prejudice, his ineffectiveness challenge to his counsel's investigation fails. *Strickland*, 466 U.S. at 687.

2. Jordan's speculation also defeats his claim of ineffectiveness for not moving to require the State to establish constructive possession of the computer images.

Jordan also faults his counsel for not requiring the judge to order the State to show constructive possession. Aplt.Br. 34-37. He theorizes that if his counsel had discovered that he "did not exercise exclusive dominion or control over the laptop," she could have required that the State address the issue of constructive possession. *Id.* at 36-37.

This argument is likewise premised on the unsupported assertions that counsel did not investigate the issue and that evidence establishing nonexclusive dominion could be found. *See* subsection D(1), *supra.* Thus, it too fails to establish that defense counsel was ineffective. *See Fernandez v. Cook,* 870 P.2d 870, 877 (Utah 1993) ("[P]roof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality."). And on the record as it stands, Jordan cannot prove that the State had to prove or could not prove constructive possession. It was undisputed that the laptop was password-encrypted. And the only record evidence of who had the password points exclusively to Jordan.

II.

THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO ASSESS THE AGE ELEMENT OF THE SEXUAL-EXPLOITATION-OF-A-MINOR CHARGES FOR FOUR OF THE DEPICTIONS.

Jordan challenges the sufficiency of the evidence supporting four of his convictions for sexual exploitation of a minor, arguing that the State failed to prove that the subject in each of the four exhibits on which the charges were based was under 18 years old. Aplt.Br. 40-46. He claims that the prosecution was required, but failed, to "provide the jury with some proof beyond the images themselves that the persons in the images were minors." *Id.* at 46. Alternatively, he argues that his trial counsel was ineffective for not using an expert to establish that the subjects were not under 18 and for not requesting an affirmative defense jury instruction. *Id.* at 46-49.

When assessing the sufficiency of the evidence to sustain a jury verdict, this Court must "review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury." *State v. Brown*, 948 P.2d 337, 343 (Utah 1997) (quotation marks and citation omitted). So reviewed, evidence will not support a jury verdict only if it "is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant

committed the crime." *Id*. (quotation marks and citation omitted). Jordan has not met that burden.

A. The State adduced sufficient evidence to permit the jury to determine the age element.

Jordan contends that the State's failure to use expert testimony to help the jury assess the age of the subjects in the challenged exhibits amounted to insufficient evidence as a matter of law because it left the jury to speculate about the ages based solely on images of individuals who were "obviously" not under eighteen. Aplt.Br. 40-46.

Jordan's claim fails for two reasons. First, nothing requires the use of expert testimony to establish the age of depicted subjects for purposes of proving sexual exploitation of a minor. The Utah Supreme Court in *State v. Alinas* rejected a claim that the lack of expert testimony concerning the age of the depicted girls rendered the evidence insufficient to support his convictions. 2007 UT 83, ¶¶30-34, 171 P.3d 1046 (in Add. E).

Jordan argues that *Alinas* is limited to cases in which the challenged images "are obviously of very young children." Aplt.Br. 45. But while *Alinas* dealt with images of children "far below the age of majority," this fact was not mentioned in its analysis of this issue or identified as a limitation on its holding about whether experts were required as a matter of law. *Alinas*, 2007 UT 83, ¶¶18, 30-34. Instead, the Court favorably cited cases from other

jurisdictions holding, without the stated limitation, that juries are capable of determining, through visual examination, whether an image depicts a child under the age of eighteen. *Id.* at ¶31 & n.5. The Court then stated, "We are of the same view." *Id.* at ¶32. It stated, without alluding to any limitation, that whether children depicted in images are minors "is a question of fact for the jury." *Id.* The Court went on to hold that the determinations of the judge and the jury in *Alinas* were reasonable, and held that the jury's factual determination of age was sufficient. *Id.* at ¶34.

Second, the jury was not asked to speculate about the ages of the subjects, let alone to do so based solely on images of persons who were "obviously" not under eighteen. Aplt.Br. 45. The trial judge followed *Alinas* and held that there was sufficient evidence to permit the case to go to the jury and to permit the jury to deliberate and determine whether the State had proved that the images depicted children below eighteen. R1649-51, 1683-84. After looking at the challenged images, the judge held that the determination was "not something that would require such expertise that a layperson could not make that judgment." "More importantly," he explained, the images were admitted with other record evidence to aid the jury in its assessment. R1650.

The judge's ruling is amply supported by the evidence. The jury was instructed that they could use their "own life experience and common-knowledge to decide whether the images are of children who are under eighteen years of age, based on their outward physical appearance and all other evidence presented to you." R428, 1717. As Jordan acknowledges, that evidence included the fact that the images were found on his laptop, and that he was the only one with the password. Aplt.Br. 44-45. There was no metadata associated with the exhibits because they had been deleted from the computer at some point before being forensically recovered. However, Jordan ignores the fact that the four images were found together with dozens of other sexually-explicit images of persons whose minority he does not question on a laptop with a single registered user: Michael. Further, the challenged images contain several common indicators suggesting that they were minors, including: lack of body and facial hair, physical proportionality and immaturity, and young facial features.

In addition to this evidence and the jury's life experience and common knowledge, this jury had something the *Alinas* jury did not: [redacted]. *See* R1347-51, 1404-06, 1606-10; State's Exh. 16-20, 23-31. Consequently, the jury had ample evidence with which to assess age without the need for an expert opinion.

Because expert testimony was neither required nor needed, and the jury had sufficient evidence to permit it to assess whether the subjects shown in the challenged exhibits were less than 18 beyond a reasonable doubt, Jordan's sufficiency argument fails.

B. Jordan has not overcome the presumption of reasonable performance because he has not shown that every reasonable attorney would have used an expert or requested an affirmative defense instruction, nor has he proven what an expert would have said, let alone that it would have so changed the evidentiary picture that a more favorable result on these four counts was reasonably likely.

Jordan argues in the alternative that trial counsel was ineffective for not using her own expert witness to establish that the images depicted people eighteen or older. Aplt.Br. 46-49. And with or without an expert, he argues, his counsel was ineffective for not making that argument to the jury and combining it with an affirmative-defense jury instruction. *Id.* at 47-48. Jordan proves neither deficient performance nor prejudice.

To prevail, Jordan must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Jordan can rebut this strong presumption only "by persuading the court that there was *no 'conceivable tactical basis* for counsel's actions.'" *Clark*, 2004 UT 25, ¶6 (emphasis in original). And the focus is on trial counsel's strategy—not the existence of

alternative strategies that, in hindsight, might have been equally reasonable or even more reasonable. *See State v. Wright*, 2013 UT App 142, ¶20, 304 P.3d 887.

1. On the present record, Jordan cannot establish ineffective assistance with respect to consulting with or calling an age expert.

Jordan argues that because counsel believed the subjects "could be" older than 18, she had to investigate and use an expert to meet the "minimum standard of competence." Aplt.Br. 48. Jordan has not proved that this is so.

The decision to call or not call a certain witness is entrusted to counsel's judgment. *State v. Franco*, 2012 UT App 200, ¶7, 283 P.3d 1004. The record shows only that counsel thought there was some question about the minority of the boys in the four images, and that she knew about the availability of age experts—she argued about the jury instruction on age and the sufficiency of evidence on the issue.

But the record says nothing about what counsel chose to do or why, let alone that all objectively reasonable counsel would have chosen differently. It is silent about whether counsel consulted with an expert or, if she did, that the expert gave her information that would have prompted all reasonable counsel to rely on expert testimony. His claim fails for that reason alone *See*

Titlow, 134 S. Ct. at 17 (deficient performance cannot be based on the absence of evidence).

Likewise, Jordan has failed to prove prejudice. There is no evidence in the record about what age-expert testimony counsel had available, let alone that it was compelling enough to tilt the evidentiary picture in Jordan's favor.

2. Jordan has not rebutted the strong presumption that his counsel reasonably decided not to pursue an affirmative defense.

Jordan also fails to establish that all reasonable counsel would have used an affirmative defense in this case. He claims that even without an expert, his counsel should have argued in closing that the challenged exhibits depicted persons over 18 and asked the judge to give an instruction directing the jury that it is an affirmative defense to the charged crime "'that no person under 18 years of age was actually depicted….'" Aplt.Br. 47-48 (quoting Utah Code Ann. §76-5b-201(4)). This, he argues would have forced the State to prove that the persons were not over 18 years old. *Id.*

The question is not whether a defendant can articulate a different strategy than that used by defense counsel, but whether a reasonable, competent lawyer could have chosen the strategy that was used in the real-time context of trial. *State v. Barela*, 2015 UT 22, ¶21, 349 P.3d 676. There was no need to force the State to prove that the boys depicted were not 18 years

old or older because the State already had to prove that they were under 18 years old. With that burden in mind, counsel legitimately chose to attempt to eliminate the images by means of a sufficiency challenge. When that failed, counsel stressed to the jury the lack of identity evidence, the importance of each juror's independent opinion, the brutally high standard of proof required for conviction, and the State's failure to meet it with these exhibits. R1801-02. Such a defense is entirely appropriate; therefore, it cannot be said that no reasonable counsel would have chosen to pursue it. *See, e.g., Honie v. State,* 2014 UT 19, ¶86, 342 P.3d 182 (mere existence of a different strategy does not establish ineffective assistance).

3. Even if counsel had asserted the affirmative defense, Jordan cannot show prejudice.

In any event, pursuit of the affirmative defense strategy would not have altered the jury's guilty verdict on the four charges, defeating Jordan's ineffectiveness claim for lack of prejudice. As recognized in defense counsel's closing argument, the State had the high burden of proving that the boys depicted in the exhibits were under 18. Had counsel pursued the affirmative defense of age, the State would have to disprove the existence of the affirmative defense beyond a reasonable doubt, i.e., prove that the images showed boys who were not eighteen or older. *State v. Drej*, 2010 UT 35, ¶15, 233 P.3d 476. The jury having already found on the evidence before it that

the State carried its burden of proving the boys to be under 18, the jury necessarily would have found that the State had disproved that they were 18 or older on an affirmative defense theory. Jordan cannot show that his counsel was ineffective for not asserting the affirmative defense regarding age. *See Strickland*, 466 U.S. at 700.

III.

JORDAN'S CUMULATIVE ERROR ARGUMENT IS MERITLESS

Finally, Jordan argues that if this Court finds that none of the individual errors warrant reversal, it should reverse based on the cumulative effect of the multiple errors. Aplt.Br. 49-51. He claims that each of the alleged errors is individually prejudicial, but argues that cumulatively, they are "even more prejudicial." *Id.* at 50.

The cumulative error doctrine requires reversal "only if the cumulative effect of ... several errors undermines our confidence ... that a fair trial was had." *Dunn*, 850 P.2d at 1229 (citations and internal quotations omitted). As discussed above, Jordan has not shown any error. Hence, there is no accumulation of error that undermines confidence in the verdict.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on November 06, 2017.

SEAN D. REYES
Utah Attorney General

/S/ KRIS C. LEONARD

KRIS C. LEONARD
Assistant Solicitor General
Counsel for Appellee

CERTIFICATE OF COMPLIANCE re:
NON-PUBLIC INFORMATION

In compliance with rule 21(g), Utah Rules of Appellate Procedure, I certify that this brief, including the addenda:

does not contain non-public information

√ contains non-public information and is marked accordingly, and that a public version of the brief has been filed with all non-public information removed.

/s/ KRIS C. LEONARD

KRIS C. LEONARD
Assistant Solicitor General

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 12, 780 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.

/S/ KRIS C. LEONARD

_____

KRIS C. LEONARD
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on November 08, 2017, two copies of the Brief of Appellee were ☐ mailed √ hand-delivered to:

Alexandra McCallum
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief via email in searchable portable document format (pdf):

√ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.

/s/ MELANIE KENDRICK

Addenda

Addendum A

U.C.A. 1953 § 76-5b-103
Formerly cited as UT ST 76-5a-2

§ 76-5b-103. Definitions

As used in this chapter:

(1) "Child pornography" means any visual depiction, including any live performance, photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where:

(a) the production of the visual depiction involves the use of a minor engaging in sexually explicit conduct;

(b) the visual depiction is of a minor engaging in sexually explicit conduct; or

(c) the visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

(2) "Distribute" means the selling, exhibiting, displaying, wholesaling, retailing, providing, giving, granting admission to, or otherwise transferring or presenting child pornography or vulnerable adult pornography with or without consideration.

(3) "Identifiable minor" means a person:

(a)(i) who was a minor at the time the visual depiction was created, adapted, or modified; or

(ii) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(b) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a birthmark, or other recognizable feature.

(4) "Identifiable vulnerable adult" means a person:

(a)(i) who was a vulnerable adult at the time the visual depiction was created, adapted, or modified; or

(ii) whose image as a vulnerable adult was used in creating, adapting, or modifying the visual depiction; and

(b) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a birthmark, or other recognizable feature.

(5) "Lacks capacity to consent" is as defined in Subsection 76-5-111(1).

(6) "Live performance" means any act, play, dance, pantomime, song, or other activity performed by live actors in person.

(7) "Minor" means a person younger than 18 years of age.

(8) "Nudity or partial nudity" means any state of dress or undress in which the human genitals, pubic region, buttocks, or the female breast, at a point below the top of the areola, is less than completely and opaquely covered.

(9) "Produce" means:

(a) the photographing, filming, taping, directing, producing, creating, designing, or composing of child pornography or vulnerable adult pornography; or

(b) the securing or hiring of persons to engage in the photographing, filming, taping, directing, producing, creating, designing, or composing of child pornography or vulnerable adult pornography.

(10) "Sexually explicit conduct" means actual or simulated:

(a) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(b) masturbation;

(c) bestiality;

(d) sadistic or masochistic activities;

(e) lascivious exhibition of the genitals, pubic region, buttocks, or female breast of any person;

(f) the visual depiction of nudity or partial nudity for the purpose of causing sexual arousal of any person;

(g) the fondling or touching of the genitals, pubic region, buttocks, or female breast; or

(h) the explicit representation of the defecation or urination functions.

(11) "Simulated sexually explicit conduct" means a feigned or pretended act of sexually explicit conduct which duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct.

(12) "Vulnerable adult" is as defined in Subsection 76-5-111(1).

(13) "Vulnerable adult pornography" means any visual depiction, including any live performance, photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where:

(a) the production of the visual depiction involves the use of a vulnerable adult engaging in sexually explicit conduct;

(b) the visual depiction is of a vulnerable adult engaging in sexually explicit conduct; or

(c) the visual depiction has been created, adapted, or modified to appear that an identifiable vulnerable adult is engaging in sexually explicit conduct.

Credits

Laws 2011, c. 320, § 15, eff. May 10, 2011; Laws 2013, c. 290, § 1, eff. May 14, 2013.

U.C.A. 1953 § 76-5b-201

§ 76-5b-201. Sexual exploitation of a minor--Offenses

(1) A person is guilty of sexual exploitation of a minor:
(a) when the person:
(i) knowingly produces, possesses, or possesses with intent to distribute child pornography; or
(ii) intentionally distributes or views child pornography; or
(b) if the person is a minor's parent or legal guardian and knowingly consents to or permits the minor to be sexually exploited as described in Subsection (1)(a).

(2) Sexual exploitation of a minor is a second degree felony.

(3) It is a separate offense under this section:
(a) for each minor depicted in the child pornography; and
(b) for each time the same minor is depicted in different child pornography.

(4) It is an affirmative defense to a charge of violating this section that no person under 18 years of age was actually depicted in the visual depiction or used in producing or advertising the visual depiction.

(5) In proving a violation of this section in relation to an identifiable minor, proof of the actual identity of the identifiable minor is not required.

(6) This section may not be construed to impose criminal or civil liability on:
(a) any entity or an employee, director, officer, or agent of an entity when acting within the scope of employment, for the good faith performance of:
(i) reporting or data preservation duties required under any federal or state law; or
(ii) implementing a policy of attempting to prevent the presence of child pornography on any tangible or intangible property, or of detecting and reporting the presence of child pornography on the property;
(b) any law enforcement officer acting within the scope of a criminal investigation;
(c) any employee of a court who may be required to view child pornography during the course of and within the scope of the employee's employment;
(d) any juror who may be required to view child pornography during the course of the person's service as a juror; or
(e) any attorney or employee of an attorney who is required to view child pornography during the course of a judicial process and while acting within the scope of employment.

Credits

Laws 2011, c. 320, § 16, eff. May 10, 2011; Laws 2016, c. 116, § 1, eff. May 10, 2016.

Addendum B

And up to this point, you know, everything that he was saying that was coming out in the investigation, well, the police dropped it. They didn't really do much. But what was coming out in the investigation or with the therapist, all these things that were coming out and the therapist finally reached the bottom and said, Yeah, I think we're done. Well, we hit a brick wall on our legal case. And we couldn't prove anything other than the kids were molesting kids. And that's when the big grand scheme was cooked up, was primarily A.J. And then Stacy was right there with it.

I didn't like it cause by then I realized that I was gonna be divorcing this woman at some point. There was no way our future, and they were coaching him on what to say, how to act, to run away from the visitation center, swear at his dad, call him a rapist, you know, all these things. And by then I had already, cause she wanted me to adopt TJ and I just said, No, I can't do it. Life is bad enough with these, you know, it's bad enough that I'm gonna end up divorced having to pay child support on a kid I adopted that I can't stand, you know. And I wouldn't go in with it and that caused a lot of problems, you know, a lot of problems. You can't even imagine the fights over that.

Because I said, Stacy, you're walking down a slippery slope. You start conditioning this kid to lie and you start teaching this kid to make these allegations, when's it gonna

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IN THE THIRD DISTRICT JUDICIAL COURT, SALT LAKE

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. MICHAEL JORDAN, Defendant.	*FILED UNDER SEAL* REQUEST FOR 412 HEARING Case No. 141910848 Hon. Ann Boyden

MICHAEL JORDAN, through his attorney SUSANNE GUSTIN, hereby requests a 412 hearing on the date of August 17, 2015 at the same time as his pretrial conference. Mr. Jordan intends to have two children testify that they were wrongly accused of sexual abuse by T.J., one of the alleged victims in the above-entitled case. The allegations were the subject of a DCFS investigation and a potential juvenile court case.

DATED this 10th day of August, 2015.

/s/ Susanne Gustin
SUSANNE GUSTIN

that, long before I ever came in the picture. And that they talk about that these boys were my sex toys, that's so repugnant to me, and so disgusting to me. And it's such a lie. And I don't even -- I don't even know how to prove it. I had my chance in trial, I wanted to testify, but I was counseled not to, because there is one part I'm not happy about, I'm ashamed of. And you've read it in the presentencing report.

You know, we -- we talk about no emotion, that's a lie. I've gone through 19-and-a-half months of hell. Anybody who's ever had to see their life ripped away from them, you know, it's just vindictive and mean if they go and say, 'oh, no emotion.' I did show emotion, and I was counseled by you, Judge, to stop. Because it was -- the jury was seeing it. And so, I sat there with as straight a face as I could listening to these horrible things being said about me. The pain that it's caused my family. My family.

My ex-wife has a history of doing this. I'm not the first man, Judge. And there's enough evidence with police departments, with DCFS, to prove that. Why it didn't come forward, I don't know. Judge, I would never sexually abuse kids. I was sexually abused as a child. And it's something that I didn't want to tell Brandon, the P.O., because to me it's an outrage that I have to

Addendum C

KeyCite Yellow Flag - Negative Treatment
Distinguished by State v. Bagnes, Utah, February 14, 2014

31 P.3d 547
Supreme Court of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Raymond Dean **MORRISON**,
Defendant and Appellant.
State of Utah, Plaintiff and Appellee,
v.
Gary Davis Peterson, Defendant and Appellant.

Nos. 20000175, 20000258.
|
Aug. 21, 2001.

Defendants were convicted in separate cases in the Fifth District Court, Washington County, G. Rand Beacham, J., and the Second District Court, Weber County, Paley W. Baldwin, J., of sexual exploitation of a minor. They appealed. After Court of Appeals consolidated and certified the cases for review, the Supreme Court, Durrant, J., held, in issues of first impression, that: (1) statute proscribing sexual exploitation of a minor was not facially overbroad; (2) statute was not unconstitutionally vague; and (3) one defendant was not entitled to have 50 counts of the offense consolidated into a single count.

Affirmed.

West Headnotes (20)

[1] **Criminal Law**
⇐ Constitutional issues in general

A constitutional challenge to a statute presents a question of law, which the Supreme Court reviews for correctness.

4 Cases that cite this headnote

[2] **Constitutional Law**
⇐ Presumptions and Construction as to Constitutionality

Constitutional Law
⇐ Proof beyond a reasonable doubt

When addressing a constitutional challenge to a statute, the Supreme Court presumes that the statute is valid, and it resolves any reasonable doubts in favor of constitutionality.

6 Cases that cite this headnote

[3] **Constitutional Law**
⇐ Prohibition of substantial amount of speech

Where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[4] **Constitutional Law**
⇐ Pornography

Child pornography, like obscenity, is unprotected by the First Amendment. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[5] **Constitutional Law**
⇐ Sex in General

Obscenity
⇐ Depiction of minors;child pornography

Statute proscribing sexual exploitation of a minor is not facially overbroad, as it properly prohibits the possession of child pornography, which is not constitutionally protected. U.S.C.A. Const.Amend. 1; U.C.A.1953, 76–5a–3(1).

Cases that cite this headnote

[6] **Constitutional Law**
⇐ Pornography

Obscenity
⇐ Depiction of minors;child pornography

Statute proscribing sexual exploitation of a minor was valid as against claim it was facially overbroad in light of statute providing that the material at issue need not be legally obscene. U.S.C.A. Const.Amend. 1; U.C.A.1953, 76–5a–3(1), 76–5a–4.

Cases that cite this headnote

[7] **Obscenity**
⇐ Depiction of minors;child pornography

Statute proscribing sexual exploitation of a minor was valid as against claim that it did not meet the requirements of *Ferber* because it prohibited possession of material depicting a "partially nude minor." U.C.A.1953, 76–5a–3(1).

2 Cases that cite this headnote

[8] **Statutes**
⇐ Superfluousness

A court's fundamental duty when construing a statute is to give effect, if possible, to every word of the statute.

3 Cases that cite this headnote

[9] **Statutes**
⇐ Superfluousness

Any interpretation which renders parts or words in a statute inoperative or superfluous is to be avoided.

6 Cases that cite this headnote

[10] **Constitutional Law**
⇐ Presumptions and Construction as to Constitutionality

Courts have a duty to construe a statute whenever possible so as to save it from constitutional conflicts or infirmities.

3 Cases that cite this headnote

[11] **Constitutional Law**
⇐ Sex offenses, incest, and prostitution
Infants
⇐ Exhibition or use of child in indecent material or performance

Statute proscribing sexual exploitation of a minor was valid as against claim that it was unconstitutionally vague because it did not define the term "sexual arousal"; challenged term had a common understanding that was sufficient to put people on warning as to the prohibited conduct. U.C.A.1953, 76–5a–3(1).

2 Cases that cite this headnote

[12] **Constitutional Law**
⇐ Statutes

A statute is not unconstitutionally vague if it is sufficiently explicit to inform the ordinary reader what conduct is prohibited.

Cases that cite this headnote

[13] **Obscenity**
⇐ Depiction of minors;child pornography

Statute proscribing sexual exploitation of a minor was constitutional as applied to defendant who possessed a picture of a young, nude girl; picture was designed "for the purpose of sexual arousal of any person," where girl was depicted in a playground setting, the child posed for the photograph, and a nude man was standing in the background. U.C.A.1953, 76–5a–3(1).

4 Cases that cite this headnote

[14] **Indictment and Information**
⇐ Distinct offenses in general

Under statute in effect in 1999, defendant was not entitled to have 50 counts of sexual exploitation of a minor consolidated into a single count; rule against multiplicity was not violated, as defendant's possession of multiple photographs depicting child pornography constituted multiple violations of the statute. U.S.C.A. Const.Amend. 5; U.C.A.1953, 76–5a–3(1) (1999).

10 Cases that cite this headnote

[15] **Obscenity**
⇐ Possession

Statute proscribing sexual exploitation of a minor is violated by the knowing possession of "any visual representation" of child pornography. U.C.A.1953, 76–5a–2(3), 76–5a–3(1).

5 Cases that cite this headnote

[16] **Criminal Law**
⇐ Sex offenses;obscenity

Each individual visual representation of child pornography that is knowingly possessed by a defendant constitutes the basis for a separate offense of sexual exploitation of a minor. U.C.A.1953, 76–5a–2(3), 76–5a–3(1).

10 Cases that cite this headnote

[17] **Indictment and Information**
⇐ Same offense

Rule against multiplicity prohibits the government from charging a single offense in several counts and is intended to prevent multiple punishments for the same act. U.S.C.A. Const.Amend. 5.

2 Cases that cite this headnote

[18] **Sentencing and Punishment**
⇐ Particular offenses

Defendant lacked standing to contend that prosecution of him on 50 counts of sexual exploitation of a minor constituted cruel and unusual punishment; defendant's constitutional argument hinged solely on the theoretical existence of a penalty that was never imposed, as he received concurrent sentences on all counts. U.S.C.A. Const.Amend. 8; U.C.A.1953, 76–5a–3(1).

Cases that cite this headnote

[19] **Sentencing and Punishment**
⇐ Proportionality

Sentencing and Punishment
⇐ Barbarous and inhumane punishment

Under the Eighth Amendment, a criminal punishment may be cruel and unusual when it is barbaric, excessive, or disproportional to the offense committed. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[20] **Sentencing and Punishment**
⇐ Conduct of trial

Trial court did not violate defendant's Eighth Amendment rights when it declined to consolidate 50 counts of sexual exploitation of a minor into a single count, which resulted in defendant's being labeled a "multiple" sex offender rather than just a sex offender; the "punishment" complained of was not imposed by the court, but, rather by defendant's voluntary entry of a guilty plea. U.S.C.A. Const.Amend. 8; U.C.A.1953, 76–5a–3(1).

Cases that cite this headnote

Attorneys and Law Firms

***549** Mark L. Shurtleff, Att'y Gen., Thomas B. Brunker, J. Frederic Voros, Jr., Asst. Att'ys Gen., Salt Lake City, for plaintiff in No. 20000175.

W. Andrew McCullough, Orem, UT, for defendant in No. 20000175.

Mark L. Shurtleff, Att'y Gen., Laura B. Dupaix, J. Frederic Voros, Jr., Asst. Att'ys Gen., Salt Lake City, for plaintiff in No. 20000258.

Neil A. Kaplan, Anneli R. Smith, Salt Lake City, for defendant in No. 20000258.

Opinion

DURRANT, Justice:

¶ 1 In separate cases, the State charged Raymond D. Morrison and Gary D. Peterson with multiple counts of sexual exploitation of a minor, a second degree felony, in violation of an earlier version of section 76–5a–3(1) of the Utah Code. [1] Morrison entered a conditional plea of guilty to twenty counts of sexual exploitation of a minor. Peterson entered a conditional plea of no contest to one count of sexual exploitation of a minor. Each appealed, and their appeals were consolidated. [2] Both Morrison and Peterson contend section 76–5a–3(1) is unconstitutional on its face. Peterson further contends that section is unconstitutional ***550** as applied to him. Morrison also argues the trial court erred in denying his motion to consolidate the counts brought against him into a single count. We affirm.

BACKGROUND

I. *STATE V. MORRISON*

¶ 2 Acting on a search warrant, officers of the St. George Police Department found and seized thousands of photographs of children from Morrison's bedroom on March 30, 1999. The photographs had been downloaded and printed from a computer. Based on the photographs, the State charged Morrison with fifty counts of sexual exploitation of a minor. Morrison filed a motion to dismiss the charges, contending that section 76–5a–3(1) was unconstitutionally overbroad and vague on its face, that it could not constitutionally be applied to him, and that it impermissibly restricted his rights under the First Amendment of the United States Constitution. Morrison also moved to consolidate the fifty counts brought against him into a single count, arguing that the acts constituted a single criminal episode. The trial court denied both motions, and Morrison entered a conditional plea of guilty to twenty of the counts against him. The court sentenced Morrison to twenty concurrent one to fifteen year sentences and assessed a $25,000 fine against him. However, the court then stayed execution of this sentence, placing Morrison on three years' probation instead.

II. *STATE V. PETERSON*

¶ 3 Peterson was a student at Weber State University in the fall of 1998. On September 30, he downloaded and printed nine photographs from the Internet using a university computer. Peterson was arrested and charged with nine counts of sexual exploitation of a minor. He moved to dismiss the charges claiming section 76–5a–3(1) was unconstitutionally overbroad and vague on its face and could not be constitutionally applied to him. The trial court denied Peterson's motion, and Peterson entered a conditional plea of no contest to one count of sexual exploitation of a minor. Peterson was placed on three years' probation.

ANALYSIS

¶ 4 On appeal, Morrison and Peterson raise three issues. They both contend section 76–5a–3(1) is unconstitutionally overbroad and vague on its face. Additionally, Peterson argues that the section is unconstitutional as applied to him. Finally, Morrison contends the trial court erred in denying his motion to consolidate the fifty counts against him into a single count. We address these issues in that order.

I. FACIAL CONSTITUTIONALITY OF SECTION 76–5a–3(1)

[1] **[2]** ¶ 5 Both Morrison and Peterson contend section 76–5a–3(1) is unconstitutionally overbroad and vague on its face. "A constitutional challenge to a statute presents a question of law, which we review for correctness.... When addressing such a challenge, this court presumes that the statute is valid, and we resolve any reasonable doubts in favor of constitutionality." *State v. Lopes,* 1999 UT 24, ¶ 6, 980 P.2d 191 (citation omitted). We disagree with Morrison's and Peterson's contentions and conclude the trial courts correctly held section 76–5a–3(1) is not unconstitutionally overbroad or vague.

A. Overbreadth Challenge

[3] ¶ 6 Recognizing "that the sexual exploitation of minors is excessively harmful to their physiological, emotional, social, and mental development," Utah Code Ann. § 76–5a–1 (1999), the legislature enacted section 76–5a–3 "to eliminate the market for those materials [that sexually exploit minors] and to reduce the harm to the minor inherent in the perpetuation of the record of his

sexually exploitive activities." *Id.* Section 76–5a–3 reads, in pertinent part, as follows:

> (1) A person is guilty of sexual exploitation of a minor:
>
> (a) when he knowingly produces, distributes, possesses, or possesses with intent to distribute, material or a live performance depicting a nude or partially nude minor for the purpose of causing sexual arousal of any person or any person's engagement in sexual conduct with the minor.

***551** *Id.* § 76–5a–3(1). Morrison and Peterson contend this section is overly broad as it prohibits the possession of constitutionally protected materials. Yet, the mere fact that a statute is overbroad to some degree does not automatically warrant reversal. "[W]here a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only 'real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.' " *Osborne v. Ohio,* 495 U.S. 103, 112, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990) (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)). We conclude section 76–5a–3(1) is not unconstitutionally overbroad.

[4] ¶ 7 "[C]hild pornography ..., like obscenity, is unprotected by the First Amendment." *New York v. Ferber,* 458 U.S. 747, 764, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). While the United States Supreme Court "has never attempted to define 'child pornography' itself," Amy Adler, *Inverting the First Amendment,* 149 U. Pa. L.Rev. 921, 936 (2001), it has given some guidance. The Court has indicated that a depiction of a nude minor, without more, does not constitute child pornography.[3] *See Ferber,* 458 U.S. at 765 n. 18, 102 S.Ct. 3348 (noting that "nudity, without more[,] is protected expression"); *Osborne,* 495 U.S. at 112, 110 S.Ct. 1691 ("[D]epictions of nudity, without more, constitute protected expression."). Further, "[a]s with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed." *Ferber,* 458 U.S. at 764, 102 S.Ct. 3348. Finally, the statute must include a scienter requirement. *Id.* at 765, 102 S.Ct. 3348.

[5] **[6]** **[7]** ¶ 8 With this guidance in mind, we now turn to the issue before us. As it pertains to Morrison and Peterson's challenge, section 76–5a–3(1) makes a person guilty of sexual exploitation of a minor "when he knowingly ... possesses ... material ... depicting a nude or partially nude minor for the purpose of causing sexual arousal of any person." Utah Code Ann. § 76–5a–3(1)(a). Morrison and Peterson assert this section is overbroad in that it prohibits possession of depictions of nude or partially nude minors, without more.[4] As Morrison and Peterson ***552** read it, a person who "knowingly ... possesses ... material ... depicting a nude or partially nude minor," *id.,* is only in violation of section 76–5a–3(1) if that person *possesses* the material "for the purpose of sexual arousal of any person." *Id.* This, they argue, is overly broad because material depicting only a nude or partially nude minor, without more, is constitutionally protected, *see Ferber,* 458 U.S. at 765 n. 18, 102 S.Ct. 3348; *Osborne,* 495 U.S. at 112, 110 S.Ct. 1691, and because "[w]hen a picture does not constitute child pornography ... it does not become child pornography because it is placed in the hands of the pedophile, or in a forum where pedophiles might enjoy it." *United States v. Villard,* 700 F.Supp. 803, 812 (D.N.J.1988), *aff'd,* 885 F.2d 117 (3d Cir.1989).

¶ 9 The State responds by arguing that Morrison and Peterson misconstrue section 76–5a–3(1) and that that section properly prohibits the possession of child pornography, which is not constitutionally protected. *See Ferber,* 458 U.S. at 764, 102 S.Ct. 3348. As the State reads it, a person who "knowingly ... possesses ... material ... depicting a nude or partially nude minor," Utah Code Ann. § 76–5a–3(1)(a), is only in violation of that section if the material *depicts* the minor "for the purpose of sexual arousal of any person." *Id.* Accordingly, the State contends, depictions of nude or partially nude minors, without more, are not proscribed by the statute. Rather, the statute requires that the depiction be "for the purpose of sexual arousal of any person." *Id.*

¶ 10 We believe the State propounds the better reading of section 76–5a–3(1). The State's construction of that section is consistent with the legislature's purpose in enacting that section. The legislature stated several times that it is the proscribed materials themselves that sexually exploit minors. *See* Utah Code Ann. § 76–5a–1 (emphasizing, repeatedly, the dangers of "materials that sexually exploit minors"). We believe this to be indicative of the legislature's intent that we look to the materials themselves, not the intent of the possessor, to determine whether they are proscribed as sexually exploitive.

[8] **[9]** ¶ 11 Further, under Morrison and Peterson's interpretation, there are two scienter requirements: the person must possess the proscribed material both "knowingly" and "for the purpose of sexual arousal of any person." *Id.* § 76–5a–3(1)(a). However, that a person possesses material "for the purpose of sexual arousal of any person," *id.*, necessarily presupposes that person possesses it "knowingly." Thus, the scienter requirement "knowingly" would be superfluous. Such an interpretation "ignore [s] our fundamental duty to give effect, if possible, to every word of the statute." *Madsen v. Borthick,* 769 P.2d 245, 252 n. 11 (Utah 1988). Indeed, " 'any interpretation which renders parts or words in a statute inoperative or superfluous is to be avoided.' " *State v. Hunt* 906 P.2d 311, 312 (Utah 1995) (quoting *United States v. Rawlings,* 821 F.2d 1543, 1545 (11th Cir.1987)).

[10] ¶ 12 Finally, this court has a " 'duty to construe a statute whenever possible so as to ... save it from constitutional conflicts or infirmities.' " *In re Marriage of Gonzalez,* 2000 UT 28, ¶ 23, 1 P.3d 1074 (quoting *State v. Bell,* 785 P.2d 390, 397 (Utah 1989)). In this case, we can avoid Morrison and Peterson's constitutional concern that section 76–5a–3(1) proscribes the possession of constitutionally ***553** protected materials by construing the section as prohibiting the knowing possession of "material ... depicting a nude or partially nude minor," Utah Code Ann. § 76–5a–3(1)(a), only if the depiction is designed "for the purpose of causing sexual arousal of any person." *Id.* A defendant's criminal liability under section 76–5a–3(1) turns not on his purpose in *possessing* the material, but, rather, on the purpose for which the nude or partially nude minor was *depicted.* If his possession was knowing, and the nude or partially nude minor was depicted "for the purpose of causing sexual arousal of any person," *id.*, a defendant may properly be subject to criminal liability. Under this reading of the statute, which we are required to make under the principles of statutory construction set forth above, section 76–5a–3(1) is not unconstitutionally overbroad.

B. Vagueness Challenge

[11] **[12]** ¶ 13 Morrison and Peterson next argue that section 76–5a–3(1) is unconstitutionally vague as "sexual arousal" is not defined. " '[V]agueness questions are essentially procedural due process issues, i.e., whether the statute adequately notices the proscribed conduct.' " *Bd. of Comm'rs of the Utah State Bar v. Petersen,* 937 P.2d 1263, 1267 (Utah 1997) (quoting *State v. Frampton,* 737 P.2d 183, 191–92 (Utah 1987)). Accordingly, "a 'statute is not unconstitutionally vague if it is sufficiently explicit to inform the ordinary reader what conduct is prohibited.' " *Id.* (quoting *State v. Theobald,* 645 P.2d 50, 51 (Utah 1982) (footnote omitted)). We conclude the statute is not unconstitutionally vague.

¶ 14 This court confronted a similar issue in *State v. Jordan,* 665 P.2d 1280 (Utah 1983). In that case, the defendants challenged, as unconstitutionally vague, a statute criminalizing depictions of minors engaged in "simulated" sexual conduct. While noting that "simulated" was not legally defined, the court found that it was "recognizable in simple lay terms as 'looking or acting like,' " and, therefore, "[t]he disputed language [was] ... sufficiently clear to convey 'warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more.' " *Id.* at 1285 (quoting *United States v. Petrillo,* 332 U.S. 1, 8, 67 S.Ct. 1538, 91 L.Ed. 1877 (1947)).

¶ 15 This case is similar. "Sexual arousal" has a common understanding that is sufficient to put people on warning as to what conduct is prohibited by the statute. It "can be construed with reasonable certainty." *Id.* at 1286. "Sexual arousal" is commonly understood as erotic excitement or stimulation. Accordingly, we conclude here as we did in *Jordan:*

> [We do] not accede to [the defendants'] argument that the word [was] not precisely defined so as to apprise them of the proscribed conduct. Words are symbols of communication and as such are not invested with the quality of a scientific formula. It is enough that they can be construed with reasonable certainty. Beyond that it suffices to add that "one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."

Id. (quoting *Boyce Motor Lines v. United States,* 342 U.S. 337, 340, 72 S.Ct. 329, 96 L.Ed. 367 (1952)). Section 76–5a–3(1) is not unconstitutionally vague.

II. CONSTITUTIONALITY OF SECTION 76–5a–3(1) AS APPLIED TO PETERSON

[13] ¶ 16 Before the trial court below, Peterson entered a conditional plea of no contest to one count of sexual exploitation of a minor. That plea related to his possession of one photograph depicting a young, nude girl who appears to be about eight or nine years old. The girl's weight is on one leg, thereby emphasizing her genitalia. She is standing on a rope web of the type commonly found on playgrounds and is looking into the camera. A man, who appears to be nude as well, is standing in the distant background. On appeal, Peterson contends section 76–5a–3(1) cannot be constitutionally applied to him for possession of the photograph described above.

¶ 17 As it pertains to the issue before us, section 76–5a–3(1) makes a person guilty of sexual exploitation of a minor if that person ***554** "knowingly ... possesses ... material ... depicting a nude or partially nude minor for the purpose of causing sexual arousal of any person." Utah Code Ann. § 76–5a–3(1)(a). Peterson does not challenge that he knowingly possessed a depiction of a nude minor; rather, he argues the photograph is not designed "for the purpose of sexual arousal of any person." *Id.* We disagree.

¶ 18 We have never addressed the issue of what a court should consider when determining whether material depicting a nude minor is designed "for the purpose of sexual arousal of any person." *Id.* However, federal courts have addressed a similar issue. Federal law prohibits the transportation across state lines of depictions of "lascivious exhibition[s] of the genitals or pubic area" of minors. In determining what constitutes a "lascivious exhibition of the genitals or pubic area," many federal courts have adopted the so-called *Dost* factors. These six factors are as follows:

> [first,] whether the focal point of the visual depiction is on the child's genitalia or pubic area; [second,] whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; [third,] whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of a child; [fourth,] whether the child is fully or partially clothed, or nude; [fifth,] whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; [and, sixth,] whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

United States v. Wolf, 890 F.2d 241, 244 (10th Cir.1989) (footnote omitted) (quoting *United States v. Dost,* 636 F.Supp. 828, 832 (S.D.Cal.1986)). The *Dost* factors should not be viewed as establishing a rigid test, however:

> [T]he *Dost* factors are generally relevant and provide some guidance in evaluating whether the display in question is [designed "for the purposes of sexual arousal of any person."] We emphasize, however, that these factors are neither comprehensive nor necessarily applicable in every situation. Although *Dost* provides some specific, workable criteria, *there may be other factors that are equally if not more important* in determining whether a photograph [is designed "for the purposes of sexual arousal of any person."] The inquiry will always be case-specific.

United States v. Amirault, 173 F.3d 28, 32 (1st Cir.1999) (emphasis added).

¶ 19 Importantly, for our purposes, the sixth factor, i.e., whether the visual depiction is intended or designed to elicit a sexual response in the viewer, "rather than being a separate substantive inquiry about the photographs, is useful as another way of inquiring into whether any of the other five *Dost* factors are met." *Id.* 173 F.3d at 35 (quoting *United States v. Villard,* 885 F.2d 117, 125 (3d Cir.1989)). In other words, to determine whether a visual depiction is intended or designed to elicit a sexual response in the viewer, a court should consider the other five *Dost* factors.

¶ 20 We believe the determination of whether material depicting a nude minor is designed "for the purpose of sexual arousal of any person," Utah Code Ann. § 76–5a–3(1)(a), is substantially similar to the determination of whether a visual depiction is intended or designed to elicit a sexual response in the viewer. Further, we believe the federal courts' application of the sixth *Dost* factor is helpful for Utah courts in determining whether material depicting a nude minor is designed "for the purpose of sexual arousal of any person." *Id.* This is not to say, however, that the Utah statute directly parallels the federal statute. For instance, federal courts consider whether the focal point of the visual depiction is on the

child's genitalia or pubic area because the federal statute proscribes certain depictions of "exhibition [s] of the genitals or pubic area" of minors. However, section 76–5a–3(1) not only proscribes "exhibition[s] of the genitals or pubic area," but also proscribes other depictions of "nude or partially nude minor[s]." Accordingly, while the *Dost* factors are helpful, not all of them are applicable to a determination that material depicts a "nude ***555** or partially nude minor for the purpose of sexual arousal of any person." [5]

¶ 21 Bearing this in mind, we now turn to the photograph at issue. We find several of the *Dost* factors are met. First, the child is completely nude. This satisfies the statutory requirement that the photograph depict a "nude or partially nude minor." Second, the child is standing on a rope web of the type commonly found on playgrounds. While a playground setting is not usually associated with sexual activity, for a child to appear in such a setting completely nude is clearly inappropriate. Indeed, the very fact that a child is depicted nude in a location commonly associated with children's daily, public activities, is indicative of the photograph's design to sexually arouse pedophiles. Third, the girl's weight is on one leg, thereby emphasizing her genitalia. Lastly, the child, who is looking into the camera, is obviously posed for the photograph. The pose emphasizes the child's nudity and genitals, thereby suggesting a purpose to sexually arouse. In addition to the listed *Dost* factors, the photograph also depicts a man, apparently nude, standing in the background. We believe the presence of a nude adult tends to indicate the photograph was designed "for the purpose of sexual arousal of any person."

¶ 22 In summary, the photograph depicts a posed, nude child, in an inappropriate setting, together with a nude adult and emphasizes the child's genitalia. We hold the photograph depicts a nude minor "for the purpose of sexual arousal of any person." Thus, section 76–5a–3(1)(a) is not unconstitutional as applied to Peterson.

III. CONSOLIDATION OF COUNTS AGAINST MORRISON

[14] ¶ 23 The final issue before us is whether the trial court erred in denying Morrison's motion to consolidate the fifty counts brought against him under section 76–5a–3 into a single count. Morrison contends the trial court's denial of that motion was based on an improper interpretation of section 76–5a–3. Alternatively, he argues, if the trial court correctly interpreted the statute in denying his motion to consolidate the counts, nevertheless, the prosecution of multiple counts of sexual exploitation of a minor in this case constitutes cruel and unusual punishment because Morrison could have been, effectively, sentenced to life in prison as a result of his guilty plea to twenty of the counts against him.

A. Prosecution of Multiple Counts Under Section 76–5a–3

¶ 24 Morrison contends section 76–5a–3 provides only for the prosecution of a single count of sexual exploitation of a minor in this case, and the trial court's contrary conclusion was erroneous. Accordingly, Morrison argues, the State's prosecution of multiple counts violated the "rule against multiplicity stem[ming] from the 5th Amendment", which "prohibits the Government from charging a single offense in several counts and is intended to prevent multiple punishments for the same act." *United States v. Kimbrough,* 69 F.3d 723, 729 (5th Cir.1995). We disagree.

[15] ¶ 25 We construe section 76–5a–3 "according to the fair import of [its] terms to promote justice." Utah Code Ann. § 76–1–106 (1999). In relevant part, section 76–5a–3(1) creates a second degree felony for "knowingly ... possess[ing] ... material ... depicting a nude or partially nude minor for the purpose of causing sexual arousal of any person or any person's engagement in sexual conduct with the minor." *Id.* § 76–5a–3(1). "Material" is defined as "any visual representation including photographs, motion pictures, slides, videotapes, or other pictorial representations produced or recorded by any mechanical, chemical, photographic, or electrical means and includes undeveloped photographs, negatives, or other latent representational objects." *Id.* § 76–5a–2(3). In short, then, section 76–5a–3(1) is violated by the knowing possession of "any visual representation" of child pornography.

***556** **[16]** **[17]** ¶ 26 The clearest reading of the statute is that each individual "visual representation" of child pornography that is knowingly possessed by a defendant constitutes the basis for a separate offense under section 76–5a–3. Accordingly, in this case, Morrison's possession of multiple photographs depicting child pornography constituted multiple violations of section 76–5a–3. Therefore, the rule against multiplicity was not

violated, as that rule only "prohibits the Government from charging a *single* offense in several counts and is intended to prevent multiple punishments for the *same* act," *Kimbrough,* 69 F.3d at 729 (emphasis added), and the trial court did not err in denying Morrison's motion to consolidate the counts against him. [6]

B. Eighth Amendment

[18] ¶ 27 Morrison next contends the prosecution of multiple counts of sexual exploitation of a minor in this case constitutes cruel and unusual punishment because he could have been, effectively, sentenced to life in prison as a result of his guilty plea to twenty of the counts against him. We conclude Morrison does not have standing to make this argument.

[19] **[20]** ¶ 28 The Eighth Amendment to the United States Constitution states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. "Under the Eighth Amendment, '[a] criminal punishment may be cruel and unusual when it is barbaric, excessive, or disproportional to the offense committed.' " *State v. Herrera,* 1999 UT 64, ¶ 33, 993 P.2d 854 (footnote omitted) (quoting *State v. Mace,* 921 P.2d 1372, 1377 (Utah 1996)). However, in this case, Morrison's constitutional argument hinges solely on the theoretical existence of a penalty that was never imposed against him, as he received concurrent sentences on all counts. Furthermore, the trial court stayed execution of the sentence and, instead, placed Morrison on probation for three years. Morrison has no standing to argue the constitutionality of a sentence not imposed on him. *See, e.g., State v. Herrera,* 895 P.2d 359, 371 (Utah 1995); *State v. Tuttle,* 780 P.2d 1203, 1215 (Utah 1989). Accordingly, we do not address this issue. [7]

CONCLUSION

¶ 29 Section 76–5a–3(1) is not unconstitutionally overbroad or vague on its face. Further, that section was constitutionally applied to Peterson. Finally, the trial court did not err in denying Morrison's motion to consolidate the counts brought against him. Accordingly, we affirm the pleas entered by Morrison and Peterson.

¶ 30 Chief Justice HOWE, Associate Chief Justice RUSSON, Justice DURHAM, and Justice WILKINS concur.

All Citations

31 P.3d 547, 428 Utah Adv. Rep. 28, 2001 UT 73

Footnotes

1 Section 76–5a–3(1) of the Utah Code was amended in 2000. *See* Utah Code Ann. § 76–5a–3(1) (Supp.2000). This opinion addresses the earlier version of that section, effective throughout both Morrison's and Peterson's prosecutions.

2 Both cases were originally appealed to the Utah Court of Appeals and then consolidated by that court. Because the consolidated appeals raised constitutional questions of first impression, the court of appeals certified the cases for our review pursuant to section 78–2a–3(3) of the Utah Code.

3 However, in *Massachusetts v. Oakes,* Justices Scalia and Blackmun asserted, in a concurring opinion written by Justice Scalia, that they would reject an overbreadth challenge to a Massachusetts statute prohibiting, with exceptions, a person from "hir[ing], coerc[ing], solicit [ing] or entic[ing], employ[ing], procur[ing], us[ing], caus[ing], encourag [ing], or knowingly permit[ting]" a minor to "pose or be exhibited in a state of nudity." 491 U.S. 576, 579, 588–90, 109 S.Ct. 2633, 105 L.Ed.2d 493 (1989). Further, citing to Justice Scalia's opinion in *Oakes,* a majority of the United States Supreme Court noted, in *Osborne v. Ohio,* that it was "skeptical" of an overbreadth challenge to an Ohio statute that, on its face, "purport[ed] to prohibit the possession of 'nude' photographs of minors." 495 U.S. 103, 112, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990). The Court noted that as the statute contained "exemptions and 'proper purpose' provisions, the statute may not be substantially overbroad." *Id.* However, the Court did not ultimately decide that issue, relying instead on the narrower construction of the statute given by the Ohio Supreme Court. *See id.* at 112–14, 110 S.Ct. 1691.

Such a statute is not before us now. As explained later in this opinion, section 76–5a–3(1) does not proscribe "depictions of nudity, without more." *Id.* at 112, 110 S.Ct. 1691.

4 While this is the principal argument upon which Morrison and Peterson rely, they do raise several other minor issues. We discuss these now, briefly. To begin, Morrison argues that the statute is overbroad in light of section 76–5a–4 of the Utah Code, which states, in relevant part, as follows:

> It is not an element of the offense of sexual exploitation of a minor that the material appeal to the prurient interest in sex of the average person nor that prohibited conduct need be portrayed in a patently offensive manner.

However, this section merely states that the material at issue need not be legally obscene. *See Miller v. California,* 413 U.S. 15, 24, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) (defining, in similar terms, legal obscenity). The United States Supreme Court has clearly stated that material need not be obscene to qualify as child pornography unprotected by the First Amendment. *See New York v. Ferber,* 458 U.S. 747, 756, 764, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982).

Morrison further contends that section 76–5a–3 does not meet the requirements of *Ferber* as it proscribes the possession of material depicting a "*partially* nude minor for the purpose of causing sexual arousal of any person." (Emphasis added.) However, other courts have upheld statutes that do not necessarily require nudity. *See Osborne,* 495 U.S. 114 n. 11, 110 S.Ct. 1691 (1990) (upholding Ohio statute that, *inter alia,* criminalized the possession of depictions of "*covered* male genitals in a discernibly turgid state" (emphasis added and internal quotations omitted)); *see also United States v. Knox,* 32 F.3d 733, 737 (3rd Cir.1994) (holding "that the federal child pornography statute, on its face, contains no nudity or discernability requirement, that non-nude visual depictions ... can qualify as lascivious exhibitions, and that this construction does not render the statute unconstitutionally overbroad").

Finally, Peterson contends, "Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Stanley v. Georgia,* 394 U.S. 557, 566, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). However, the State has not done so here. As in the Supreme Court's *Osborne* case, "[t]he State does not rely on a paternalistic interest in regulating [Peterson's] mind. Rather, [Utah] has enacted [section 76–5a–3] in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children." 495 U.S. at 109, 110 S.Ct. 1691; *see also* Utah Code Ann. § 76–5a–1.

5 We particularly note that the fourth *Dost* factor, whether the child is fully or partially clothed, or nude, is inapplicable in determining whether a depiction is designed "for the purpose of sexual arousal of any person." This is because the statute sets this factor forth separately by requiring the photograph depict a "nude or partially nude minor."

6 Again, we make clear that this conclusion applies only to the relevant version of section 76–5a–3. The current version of that section itself explicitly addresses the issue of when the State can file separate counts against a defendant. Section 76–5a–3(3), which became effective May 1, 2000, states as follows:

> It is a separate offense under this section:
> (a) for each minor depicted, and if more than one minor is depicted in the same material or live performance in violation of this section, the depiction of each individual minor in the material or live performance is a separate offense;
> (b) each time the same minor is depicted in different material; and
> (c) each time the same minor is depicted in a separate live performance.

Utah Code Ann. § 76–5a–3(3) (Supp.2000).

7 Morrison also contends the trial court's failure to consolidate the counts against him violated his Eighth Amendment rights because he is now a "multiple" sex offender rather than just a sex offender. However, the label "multiple" sex offender was affixed to Morrison as a direct result of his own voluntary entry of a guilty plea. The "punishment" complained of was not imposed by the court. Accordingly, there is no merit to the contention that the trial court violated Morrison's Eighth Amendment rights.

End of Document

INSTRUCTION NO. 62

Determination whether material violates sexual exploitation of a minor:

(1) In determining whether material is a violation of sexual exploitation of a minor, the material need not be considered as a whole, but may be examined by the jury in part only.

(2) It is not an element of the offense of sexual exploitation of a minor that the material appeal to the prurient interest in sex of the average person nor that the prohibited conduct need be portrayed in a patently offensive manner.

Addendum D

said. Go read it from the beginning to the end.

DETECTIVE AVERETT: Kay.

MICHAEL JORDAN: Go read it and you'll see, you'll see how it changes. Starts out with just the brother and the sister and then it involves the father.

DETECTIVE AVERETT: Okay. So but why, now you said that you think this, they're saying this because they're plotting against you for a custody issue. I mean, why would you say that? You said you never thought about that.

MICHAEL JORDAN: When Stacy said, I found the child porn on your phone, that is why.

DETECTIVE AVERETT: Okay. Did you ever look at porn when the kids were home?

MICHAEL JORDAN: No, not when they were around. They may have been in the other room, but I was in a room with closed door.

DETECTIVE AVERETT: What about in your truck?

MICHAEL JORDAN: Felt it was private. I have looked at porn in my truck, but frankly, no.

DETECTIVE AVERETT: Did you look in it when A.J. was with you when you guys were working, you guys were on some down time?

MICHAEL JORDAN: Um, there was a time or two when he'd turn on a video, but I never initiated it.

DETECTIVE AVERETT: And you guys watched it together

or?

MICHAEL JORDAN: He'd show it to me and I'd be like, you know, okay, now put it away, you know. (Inaudible) when I'm at work I'm like in this little square box.

DETECTIVE AVERETT: Okay. All right. Give me one sec. Do you need more water? Are you good for a minute?

MICHAEL JORDAN: Think I'm good.

DETECTIVE AVERETT: Kay. Give me one second and I'll be right back, okay?

MICHAEL JORDAN: (No audible response).

DETECTIVE AVERETT: [exits room for five/six minutes]

All right, so we got your phone. So what, what's the password there?

MICHAEL JORDAN: [takes phones, enters code, hands back to detective]

DETECTIVE AVERETT: Somewhere there under the photos?

MICHAEL JORDAN: Uh-huh (affirmative).

DETECTIVE AVERETT: [looking through phone] And these are the, these are the pictures from-

MICHAEL JORDAN: - I was taking pictures of his computer. He had some porn windows open. So I snapped pictures of them to prove my point. You know, Stacy's always, You're pervert. I was like, Yeah, look at your own kid. Look at your own daughter. There is one other thing.

DETECTIVE AVERETT: Kay.

Addendum E

171 P.3d 1046
Supreme Court of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Lexis **ALINAS**, Defendant and Appellant.

No. 20051000.
|
Oct. 26, 2007.

Synopsis
Background: Defendant was convicted in the Third District, Salt Lake, Judith S. Atherton, J., of seven counts of sexual exploitation of a minor. Defendant appealed.

Holdings: The Supreme Court, Wilkins, Associate Chief Justice, held that:

[1] instruction was not rendered overly-broad by including "computer-generated image" in the definition of child pornography;

[2] instruction defining "sexually explicit conduct" as a depiction of nudity for purposes of "causing sexual arousal," was sufficient;

[3] defendant opened the door to admission of adult pornographic images;

[4] expert testimony was not required to show that children depicted were under 18 years or that they were real children;

[5] probative value of enlarged images outweighed any prejudice; and

[6] any omission resulting from trial counsel's failure to introduce comparable legal nude child depictions did not require supplementation of the record.

Affirmed.

West Headnotes (15)

[1] **Criminal Law**
⇐ Scope of Inquiry

Criminal Law
⇐ Questions of Fact and Findings

The Supreme Court reviews a trial court's factual findings for clear error and reviews its conclusions of law for correctness.

1 Cases that cite this headnote

[2] **Criminal Law**
⇐ Constitutional issues in general

A constitutional challenge to a statute presents a question of law, which the Supreme Court reviews for correctness.

Cases that cite this headnote

[3] **Constitutional Law**
⇐ Presumptions and Construction as to Constitutionality

Constitutional Law
⇐ Proof beyond a reasonable doubt

When addressing a constitutional challenge to a statute, the Supreme Court presumes that the statute is valid, and resolves any reasonable doubt in favor of constitutionality.

Cases that cite this headnote

[4] **Criminal Law**
⇐ Elements of offense and defenses

On appeal from convictions for sexual exploitation of a minor, Supreme Court would review for manifest injustice defendant's claims that jury instructions improperly allowed conviction for "any visual depiction," including "computer-generated" depictions, and that the instructions failed to fully and fairly define the phrase "sexually explicit conduct," where defendant failed to object to the instructions at trial. West's U.C.A. § 76–5a–3.

Cases that cite this headnote

[5] **Criminal Law**
⇐ Objections in General

Unless a party objects to a jury instruction, the instruction may not be assigned as error except to avoid a manifest injustice.

1 Cases that cite this headnote

[6] **Criminal Law**
⇐ Necessity of Objections in General

To establish plain error, a defendant must show that (1) an error exists, (2) the error should have been obvious to the trial court, and (3) the error is harmful.

1 Cases that cite this headnote

[7] **Obscenity**
⇐ Depiction of minors;child pornography

Jury instruction was not rendered overly-broad by including "computer-generated image" in the definition of child pornography, for purposes of conviction for sexual exploitation of a minor, despite defendant's claim that the instruction potentially allowed jury to convict him for possessing virtual child pornography; the instruction did not allow a conviction for images that "appeared to be" child pornography, and the children in the images were far below the age of majority. U.S.C.A. Const.Amend. 1; West's U.C.A. § 76–5a–3.

3 Cases that cite this headnote

[8] **Obscenity**
⇐ Definitions;Test for Obscenity

As a general rule, pornography can be banned only if obscene. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[9] **Obscenity**
⇐ Depiction of minors;child pornography

States are entitled to greater leeway in the regulation of pornographic depictions of children.

Cases that cite this headnote

[10] **Obscenity**
⇐ Depiction of minors;child pornography

Jury instruction in trial for sexual exploitation of a minor, defining the term "sexually explicit conduct" as a depiction of nudity for purposes of "causing sexual arousal," in accordance with statutory definition, was sufficient; there was no question that the pictures were, at the very least, being distributed for the purpose of sexual arousal, the jury concluded that the child depictions were intended for sexual arousal, and that determination was not unreasonable. U.S.C.A. Const.Amend. 1; West's U.C.A. § 76–5a–3.

Cases that cite this headnote

[11] **Criminal Law**
⇐ Evidence Admissible by Reason of Admission of Similar Evidence of Adverse Party

Defendant opened the door to admission of adult pornographic images, in trial for sexual exploitation of a minor, when he raised defense that he possessed both child and adult photographs not for sexual arousal but to explore his thwarted wishes and efforts to be a woman instead of a man. West's U.C.A. § 76–5a–3.

Cases that cite this headnote

[12] **Obscenity**
⇐ Depiction of actual child;virtual or computer-generated images

State was not required to introduce expert testimony that children depicted in pornographic images were under 18 years of age or that the children were real children, rather than virtual children, in trial for sexual exploitation of a minor, where jury was instructed to convict only if each child

depicted was "a minor engaging in sexually explicit conduct," and that a minor was a person below the age of 18 years. West's U.C.A. § 76–5a–3.

3 Cases that cite this headnote

[13] **Criminal Law**
⇐ Photographs arousing passion or prejudice;gruesomeness

Probative value of child pornography images, enlarged to 8 by 11 inches, outweighed any prejudice resulting from their being enlarged, and thus the pictures were admissible in trial for sexual exploitation of a minor; the pictures were the only evidence of the crime and were the essence of the crime, and enlarging the exhibits was helpful to jury in determining whether subjects were real and were minors and whether the pictures were intended for sexual arousal. West's U.C.A. § 76–5a–3.

Cases that cite this headnote

[14] **Criminal Law**
⇐ Evidence calculated to create prejudice against or sympathy for accused

The fact that evidence is prejudicial does not, by itself, render that evidence inadmissible; rather if the evidence is prejudicial but is at least as probative it is properly admissible.

Cases that cite this headnote

[15] **Criminal Law**
⇐ Remand for amplification of record

Any omission in record on appeal resulting from trial counsel's failure to introduce "comparable nude child depictions" that were legal, was apparent from the record, and such exhibits would be irrelevant, in trial for sexual exploitation of a minor, and thus record on appeal did not require factual supplementation for review of defendant's claim of ineffective assistance of trial counsel; community standards did not apply to cases of child pornography, rather the purpose for which the image was created was relevant to the charges. West's U.C.A. § 76–5a–3; Rules App.Proc., Rule 23B.

1 Cases that cite this headnote

Attorneys and Law Firms

***1047** Mark L. Shurtleff, Att'y Gen., Kenneth A. Bronston, Asst. Att'y Gen., William K. Kendall, Michael S. Colby, Salt Lake City, for plaintiff.

Ronald S. Fujino, Salt Lake City, for defendant.

Opinion

WILKINS, Associate Chief Justice:

¶ 1 Defendant Lexis Alinas appeals from convictions of seven counts of Sexual Exploitation of a Minor, a second degree felony, in violation of Utah Code section 76–5a–3. Alinas seeks reversal by raising several issues: (1) whether the jury instructions used language which condemned constitutionally protected speech; (2) whether the introduction of adult pornography, possessed by Alinas at the time of his arrest, was improperly introduced and considered by the jury; (3) whether the State failed to prove that the child exhibits depicted real children under the age of eighteen; (4) whether Alinas was prejudiced by the use of enlarged exhibits; (5) whether trial counsel was ineffective; and (6) whether Alinas' due process rights were violated ***1048** when the court of appeals rejected his 23B motion.

BACKGROUND

¶ 2 While walking past a bank of computers on the way to her office, a librarian at the University of Utah's Marriott Library noticed, on the top of Alinas' computer screen, the headline "Little Girls Extreme" and several small pictures. The librarian immediately alerted library security, who, after speaking with Alinas and confirming that he had been viewing child pornography, notified the University of Utah Police. Alinas was arrested and searched. The officer found two floppy disks in Alinas' coat pocket. The officer verified that the disks contained images of nude female children, along with images of nude adult women.

¶ 3 At trial, Alinas admitted that he had downloaded nude pictures of young girls and saved them to the disks found in his coat pocket. However, Alinas denied possessing the pictures for the purpose of sexual arousal. Rather, Alinas claimed that the pictures were intended to help him visualize what he would have been like as a woman.

¶ 4 Alinas testified that from a very young age he had struggled with his sexual identity. He further testified that for the past sixteen or seventeen years he has dressed like a woman, that he once attempted to castrate himself, that he fantasized about being reborn as a girl, and that he considers himself to be a woman. According to Alinas, he searched the internet for pictures "that would represent the way I felt that I should have been born." Essentially, he used the pictures to envision himself as a little girl and as a woman. It was in furtherance of this goal, rather than for sexual arousal, that Alinas claimed that he downloaded the images on the day of his arrest.

¶ 5 Alinas was charged with seven counts of Sexual Exploitation of a Minor. A jury found him guilty on all counts. The court sentenced him to seven one-to-fifteen-year prison terms; the court then suspended the prison terms for all counts, granted him credit for the 607 days previously served, and placed him on probation for thirty-six months.

¶ 6 Alinas moved for remand under Rule 23B of the Utah Rules of Appellate Procedure. The court of appeals denied the motion. Alinas appeals.

STANDARD OF REVIEW

[1] [2] [3] ¶ 7 We review the trial court's factual findings for clear error and review its conclusions of law for correctness. *State v. Tiedemann,* 2007 UT 49, ¶ 11, 162 P.3d 1106. A constitutional challenge to a statute presents a question of law, which we review for correctness. *State v. Morrison,* 2001 UT 73, ¶ 5, 31 P.3d 547. "When addressing such a challenge, this court presumes that the statute is valid, and we resolve any reasonable doubt in favor of constitutionality." *Id.* (quoting *State v. Lopes,* 1999 UT 24, ¶ 6, 980 P.2d 191).

ANALYSIS

¶ 8 Alinas raises several issues on appeal, most of which were unpreserved below. We review each issue in turn.

I. THE JURY INSTRUCTIONS

[4] ¶ 9 Alinas attacks the validity of the jury instructions on two grounds. First, he claims that by allowing conviction for "any visual depiction," including "computer-generated" depictions, the instructions violated the rule set forth in *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). Second, he claims that the instructions failed to fully and fairly define the phrase "sexually explicit conduct."

[5] [6] ¶ 10 Alinas failed to object to the instructions at trial. " '[U]nless a party objects to an instruction ... the instruction may not be assigned as error except to avoid a manifest injustice.' " *State v. Casey,* 2003 UT 55, ¶ 39, 82 P.3d 1106 (quoting Utah R.Crim. P. 19(e)). We have held that "in most circumstances the term 'manifest injustice' is synonymous with the 'plain error' standard...." *Id.* ¶ 40 (quoting *State v. Verde,* 770 P.2d 116, 121–22 (Utah 1989)). To establish plain error, a defendant must ***1049** show that "(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful." *Id.* ¶ 41 (quoting *State v. Powell,* 872 P.2d 1027, 1031 (Utah 1994)).

¶ 11 Under this standard, Alinas' attack on the jury instructions fails.

A. Ashcroft v. Free Speech Coalition *and Computer–Generated Images*

[7] [8] [9] ¶ 12 As a general rule, pornography can be banned only if obscene. *See Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). However, in *New York v. Ferber,* the Supreme Court held that a state may proscribe the production or possession of child pornography whether or not the images are obscene. *New York v. Ferber,* 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). This is because "[t]he *Miller* standard ... does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children." *Id.* at 761, 102 S.Ct. 3348. Accordingly, "[s]tates are entitled to greater leeway in the

regulation of pornographic depictions of children." *Id.* at 756, 102 S.Ct. 3348.

¶ 13 However, in *Ashcroft v. Free Speech Coalition,* the Supreme Court restricted the states' ability to prosecute "virtual child pornography." 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). According to *Ashcroft,* "virtual" child pornography does not qualify for heightened protection under *Ferber* because it is "speech that records no crime and creates no victims by its production." *Id.* at 250, 122 S.Ct. 1389.

¶ 14 Therefore, the Court held that § 2256(8)(D) of the Child Pornography Prevention Act ("CPPA") was unconstitutionally broad. That section prohibited "any visual depiction, including photograph, film, video, picture, ... or computer-generated image [that] is, or appears to be, of a minor engaging in sexually explicit conduct." *Id.* at 241, 122 S.Ct. 1389. Alinas claims that the jury instructions in this case are similarly deficient.

¶ 15 The instructions in this case, taken verbatim from Utah Code section 76–5a–2, require that the jury, in order to convict, find that Alinas knowingly possessed child pornography, which was defined as "any visual depiction, photograph, picture or computer-generated image or picture of a minor engaging in sexually explicit conduct."

¶ 16 Alinas focuses his argument on the instructions' use of the term "computer-generated," a common phrase between the CPPA and the instructions in this case. He argues that the use of this language potentially allowed the jury to convict him for possessing "virtual child pornography," which *Ashcroft* forbids.

¶ 17 We disagree. *Ashcroft* appears to have based its holding on the "or appears to be" language of § 2256(8)(D). [1] The CPPA prohibited images that "appeared to be" children, but which were in fact not. *Ferber's* heightened protection, therefore, which is afforded for the purpose of eliminating child abuse, did not apply. *Ashcroft,* 535 U.S. at 241–42, 122 S.Ct. 1389. The jury instructions in this case did not allow conviction for possession of what "appeared to be" child pornography, but, rather, clearly required that the jury find that the pictures were of "a minor engaging in sexually explicit conduct." The instructions further defined "minor" as "a person younger than 18 years of age." The instructions allowed conviction only upon a finding that the pictures contained actual, and not virtual, children.

¶ 18 We also reject Alinas' argument that the instructions are invalid because a jury could conceivably convict a person for possession of "virtual" images under a mistaken belief that the term "computer-generated image" included such images. "[A] person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." ***1050** *Ferber,* 458 U.S. at 767, 102 S.Ct. 3348. The images possessed by Alinas in this case were clearly of real children, far below the age of majority. These were not "virtual" images. In fact, Alinas' counsel conceded at oral argument that the images in this case do not appear to be either virtual or non-minors. Accordingly, the argument of the potential overbreadth of the term "computer-generated image" fails. [2]

B. Adequacy of the Definition of "Sexually Explicit Conduct"

[10] ¶ 19 Alinas next argues that the jury instructions failed to adequately define the term "sexually explicit conduct." Taken from Utah Code section 76–5a–2(8)(f), the instructions defined the term as "the visual depiction of nudity or partial nudity for the purpose of causing sexual arousal of any person." Alinas argues that this definition violates *Ferber* because, according to that case, "nudity, without more[,] is protected expression." *Ferber,* 458 U.S. at 765 n. 18, 102 S.Ct. 3348. Alinas argues that, in order to qualify as "sexually explicit conduct," there must be, in addition to nudity, a depiction of some affirmative sexual act, such as intercourse, bestiality, masturbation, etc.

¶ 20 We disagree with Alinas' assertion now, as we did in *State v. Morrison,* 2001 UT 73, 31 P.3d 547. In *Morrison,* we concluded that section 76–5a–3(1), an earlier version of the analogous section of Utah's Sexual Exploitation of Children statute that contains nearly identical language as section 76–5a–2, was not unconstitutionally vague. [3] The "something more" than simple depictions of nudity, as required by *Ferber,* are the "two scienter requirements [of the statute]: the person must possess the proscribed material both 'knowingly' and 'for the purpose of sexual

arousal of any person.' " *Morrison,* 2001 UT 73, ¶ 11, 31 P.3d 547.

¶ 21 We also indicated that a court should look to the "purpose" of the depictions. If an image is "designed 'for the purpose of causing sexual arousal,' " the knowing possession of that image may properly be proscribed.[4] *Id.* ¶¶ 10, 12.

¶ 22 In this case, Alinas found the images on a web page called "Little Girls Extreme." There can be no question that the pictures were, at the very least, being distributed for the purpose of sexual arousal. The jury concluded that the child depictions, in this case, were intended for sexual arousal, and that determination was not unreasonable.

¶ 23 The definition of "sexually explicit conduct" contained in the jury instructions was not erroneous. The trial court could reasonably rely on our affirmation in *Morrison* of nearly identical language to that of the instructions here.

II. THE INTRODUCTION OF ADULT PORNOGRAPHY

¶ 24 Like the prior issue, this issue was not preserved and is reviewed accordingly.

[11] ¶ 25 Alinas argues that the prosecution's introduction of the adult pornography into evidence tainted the jury's consideration of the child pornography. He argues that because the adult pornography was more sexually graphic than the child depictions, the presumption of arousal from those pictures would improperly overlap onto their consideration of the child depictions: specifically, ***1051** whether they were intended for sexual arousal. The State counters that by adopting the trial strategy he did, Alinas opened the door for the introduction of the adult exhibits.

¶ 26 At trial, Alinas contended that he possessed both the child and adult photographs not for sexual arousal but to explore his thwarted wishes and efforts to be a woman instead of a man.

¶ 27 By claiming that he possessed the pictures in order to view himself as a girl and as a woman, Alinas established a reasonable defense strategy. This strategy was intended to prevent the prosecution from establishing that he possessed the child exhibits "for the purpose of causing sexual arousal." The State introduced the adult exhibits to invite the jury to consider the plausability of Alinas' defense that he did not possess any of the pictures for the purpose of sexual arousal. By arguing that Alinas could only have possessed the adult photographs for the purpose of sexual arousal, the State sought to impeach Alinas' testimony.

¶ 28 In its closing statement, the prosecution stated, "[W]e have the adult photographs, not because there is any crime charged for those, because there is no crime in that. There is no crime here of adults.... [The adult images] tell you that when [Alinas] told you he's asexual and it had nothing to do with sexual arousal, look at those photographs. These are sexual photographs."

¶ 29 Alinas' defense strategy opened the door, and the State could reasonably counter that defense by impeaching his testimony. The prosecution properly limited the scope within which the jury was to consider the adult exhibits; that is, they were only there to show Alinas' sexual attraction to women, contrary to his testimony. The admission of the adult exhibits was not clear error.

III. PROVING THAT THE IMAGES WERE OF REAL CHILDREN UNDER THE AGE OF EIGHTEEN

[12] ¶ 30 Alinas claims that the State failed to prove the age of the children depicted. He also claims that the State failed to prove that the images depicted real children. To qualify for regulation under *Ferber,* and to avoid violating *Ashcroft,* child pornography must depict a real, non-virtual minor. As such, Alinas argues that the only way the State can prove beyond a reasonable doubt that the pictures were of actual children under eighteen years of age is through the introduction of expert testimony. Because no expert testimony was given in this case, Alinas claims the State failed to meet its burden.

¶ 31 Alinas cites to no case that supports his claim, and we have found only cases that express the contrary view. For example, courts have generally held that the jury themselves, through visual examination, are capable of making the determination whether the children depicted are under eighteen years of age.[5] Likewise, every federal

circuit court to address the issue has held that a state may prove that images of children are real, as opposed to virtual, merely by allowing the fact finder to examine the images themselves. [6]

¶ 32 We are of the same view. Whether an image depicts a virtual child or a real child is a question of fact for the jury. *United States v. Rodriguez–Pacheco,* 475 F.3d 434, 438 (1st Cir.2007). Also, whether the children depicted are minors is a question of fact for the jury. ***1052** *United States v. Riccardi,* 258 F.Supp.2d 1212, 1218 (D.Kan.2003). We afford such determinations deference.

¶ 33 In this case, both the jury and the trial judge independently concluded that the child exhibits depict real children. The jury was instructed to convict only if each child exhibit depicted "a minor engaging in sexually explicit conduct." They were further instructed that a "minor" is "a person younger than 18 years of age."

¶ 34 Applying these instructions, the jury found that each child exhibit depicted a real person younger than eighteen years of age. Additionally, the trial judge examined the child exhibits herself and determined that they "depict females with undeveloped breasts, naked or partially naked, and because the age of majority is 18 years of age, I think there is sufficient evidence to send [the child exhibits] to the jury." The determinations of the judge and jury in this case were reasonable. The factual determination by the jury is sufficient.

IV. ENLARGED EXHIBITS

[13] ¶ 35 Alinas claims that he was prejudiced because the child exhibits were enlarged to 8 x 11 inches. He asserts that smaller, possibly black and white prints would have been just as probative but would not have had the prejudicial effect. This issue was not preserved and is reviewed accordingly.

[14] ¶ 36 "[T]he fact that evidence is prejudicial does not, by itself, render that evidence inadmissible." *State v. Ramirez,* 924 P.2d 366, 369–70 (Utah Ct.App.1996). Rather "if the evidence is prejudicial but is at least as probative ... it is properly admissible." *Id.* at 370 (quoting *State v. Taylor,* 818 P.2d 561, 571 (Utah Ct.App.1991)).

¶ 37 In this case, the trial court did not commit error in admitting the enlarged exhibits because the probative value of those exhibits outweighed any prejudice that may have resulted from their being enlarged. The probative value of the child exhibits is very high. The exhibits were the only evidence of the crime and were, in fact, the very essence of the crime. Enlarging the exhibits was helpful to the jury in determining whether the requirements of the statute were met, namely, were the subjects real and were they minors. Also, enlarging the exhibits helped the jury to determine if the pictures were intended for sexual arousal by showing, for instance, that the children were wearing makeup and that their genitals were exposed.

V. INEFFECTIVE ASSISTANCE, DUE PROCESS, AND THE 23B MOTION

[15] ¶ 38 Alinas claims that the court of appeals violated his right to due process in denying his rule 23B motion. Alinas' 23B motion sought retrial to supplement the record on appeal with "comparable nude child depictions" that were presumably constitutional. The court of appeals held that Alinas was not entitled to remand because "the alleged omissions [were] apparent from the record," and because his theory for remand went "beyond the scope of rule 23B's purpose of supplementing the record with facts necessary to allow assertion of the ineffectiveness claims on direct appeal." We agree with the court of appeals.

¶ 39 Rule 23B allows an appellate court to remand a case to the trial court to supplement the record with facts that are unavailable but necessary to review a claim of ineffective assistance of counsel. If a claimant meets the requirements set forth in the rule, "[a] court *may* order that the case be temporarily remanded." Utah R.App. P. 23B (emphasis added).

¶ 40 We agree with the court of appeals that the record required no factual supplementation for a review of an ineffective assistance of counsel claim in this case. It is true that trial counsel failed to introduce similar, presumably legal, child depictions. However, the alleged omissions are apparent from the record, and additional exhibits were unnecessary.

¶ 41 Alinas claims that his trial counsel should have found pictures of nude children, located, perhaps, in public libraries or art museums, and introduced them to show

that the images he possessed at the time of his arrest are not illegal. However, such a demonstration, presumably aimed at showing that the pictures in this case were not "obscene" ***1053** under a contemporary community standard, is not relevant to the charges at trial. *Ferber* makes clear that community standards do not apply to cases of child pornography. We do not require the State to show that child pornography violates the contemporary community standard, and a showing to the contrary by defense counsel would be irrelevant.

¶ 42 As we have said, it is the purpose for which the image is created that matters. *Morrison,* 2001 UT 73, ¶ 12, 31 P.3d 547. In this case, these images were clearly created and marketed for sexual arousal. Visiting such a website and downloading the child pornography it provides is "promot[ing] the sexual exploitation of children." *Ashcroft,* 535 U.S. at 240, 122 S.Ct. 1389. The introduction of depictions that lack the requisite creative intent would not aid the jury. Moreover, depictions that *were* made and marketed for a similar purpose would also be illegal. The court of appeals was correct: a remand for factual supplementation of the record is unnecessary to dispose of Alinas' ineffective assistance of counsel claim.

CONCLUSION

¶ 43 The jury instructions in this case did not violate *Ashcroft* because they did not allow for conviction unless the pictures contained an image of an actual minor. No error, clear or otherwise, exists in the introduction of the adult pornography or in the admission of the enlarged child depictions. The jury was correctly charged to make the determination as to whether the images depicted real children and whether those children were minors.

¶ 44 Affirmed.

¶ 45 Chief Justice DURHAM, Justice DURRANT, Justice PARRISH, and Justice NEHRING concur in Associate Chief Justice Wilkins' opinion.

All Citations

171 P.3d 1046, 589 Utah Adv. Rep. 37, 2007 UT 83

Footnotes

1 Numerous courts have concluded, as do we, that *Ashcroft* was based on the "or appears to be" language of the CPPA. *See, e.g., United States v. Rodriguez–Pacheco,* 475 F.3d 434, 440 (1st Cir.2007) ("[*Ashcroft*] held that 18 U.S.C. § 2256(8)(B) was overbroad because of the 'or appears to be' clause.").

2 We note, however, that the term "computer-generated image" as contained in Utah Code section 76–5a–2 is properly defined as images of *real children* that are saved, loaded, or displayed on a computer or computer screen. "Computer-generated images" do *not* include virtual images, which are images that are digitally created by computer and which do not contain actual, real children. The State would be wise to include such defining language in future instructions to avoid potential violations of *Ashcroft.*

3 *See Morrison,* 2001 UT 73, ¶¶ 1 n. 1, 6–12, 31 P.3d 547 (upholding the 1985 version of section 76–5a–3(1), which then provided: "A person is guilty of sexual exploitation of a minor ... [w]hen he knowingly ... possesses ... material ... depicting a nude or partially nude child for the purpose of causing sexual arousal of any person....").

4 We note that possession of such materials may be justified in limited circumstances. Such circumstances would include possession by a judge, prosecutor, defense counsel, and jury that is necessary as part of criminal proceedings. The possession of the materials in cases such as these is allowed because that possession does not "promote the sexual exploitation of children." *Ashcroft,* 535 U.S. at 240, 122 S.Ct. 1389.

5 *See, e.g., United States v. Riccardi,* 258 F.Supp.2d 1212, 1218 (D.Kan.2003) ("There is no requirement that expert testimony be presented in child pornography cases to establish the age of children in the picture."); *United States v. Villard,* 700 F.Supp. 803, 814 (D.N.J.1988) ("[T]he jury can examine the photographs in question and determine for itself whether the individual is under eighteen years of age."); *People v. Phillips,* 346 Ill.App.3d 487, 282 Ill.Dec. 48, 805 N.E.2d 667, 675 (Ill.App. Ct.2004) (quoting *People v. Thomann,* 197 Ill.App.3d 488, 143 Ill.Dec. 813, 554 N.E.2d 748, 755 (Ill.App. Ct.1990)) ("[A] court does not need expert testimony to determine whether the participants are under age....").

6 *See United States v. Kimler,* 335 F.3d 1132, 1142 (10th Cir.2003) ("Juries are still capable of distinguishing between real and virtual images ...."); *see also United States v. Rodriguez–Pacheco,* 475 F.3d 434, 438 (1st Cir.2007) (stating that

it is "universally accept [ed] ... that juries are capable of distinguishing between real and virtual images, without expert assistance").

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