

IN THE COURT OF APPEALS OF IOWA

No. 17-0597
Filed March 21, 2018

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LOREN LONG,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Paul L. Macek, Judge.

A defendant appeals his convictions of ten counts of sexual exploitation of a minor, challenging the jury instructions and the admission of photographic evidence. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Maria Ruhtenberg, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Darrel L. Mullins, Assistant Attorney General, for appellee.

Considered by Vaitheswaran, P.J., Bower, J., and Scott, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2018).

SCOTT, Senior Judge.

Following a jury trial, Loren Long was convicted of ten counts of sexual exploitation of a minor, in violation of Iowa Code section 728.12(3) (2015), for possessing child pornography. On appeal he asserts his counsel was ineffective for failing to object to the marshalling jury instruction he asserts violates the unanimity rule. He also claims the court abused its discretion in admitting an excessive amount of photographs of child pornography and child erotica. In addition, Long filed a pro se brief appearing to challenge the sufficiency of the evidence he possessed the child pornography. For the reasons stated herein, we affirm his convictions.

I. Background Facts and Proceedings.

In the fall of 2014, Long became a resident at Freedom Home Ministries, a nonprofit organization dedicated to helping those who are homeless and suffering from addiction start over with life. After several months, Long violated the house rules and was subject to immediate dismissal. After he went to work, staff with the ministry entered his room to pack up his belongings. During that process, the staff located a tote containing a large quantity of printed pictures, some of which contained photographs of children in a sexual manner. The staff contacted police, who obtained a search warrant and seized the pictures and a computer used by the residents.

The State filed ten counts against Long for his possession of child pornography. Prior to trial, Long filed a motion in limine seeking to restrict the number of photographs that could be shown to the jury. The court restricted the State to fifty pictures it claimed amounted to child pornography and five pictures of

child erotica, which was less than the 124 total pictures the State intended to enter into evidence. The case proceeded to jury trial in February 2017, and the jury returned a guilty verdict on each of the ten counts. Long was sentenced to two years in prison on each of the ten counts and those terms were ordered to run consecutively for a total term of twenty years. He now appeals.

II. Scope and Standard of Review.

We review de novo Long's claim his counsel was ineffective in failing to object to the marshalling jury instruction. See *State v. Ondayog*, 722 N.W.2d 778, 783 (Iowa 2006). The district court's decision to admit photographic evidence is reviewed for abuse of discretion. *State v. Hunt*, 801 N.W.2d 366, 374 (Iowa Ct. App. 2011) ("The determination to admit or to refuse admission into evidence of the photographs lies initially in the discretion of the trial court, and we will not reverse except when an abuse of discretion is shown, as where the evidence is clearly irrelevant or prejudicial." (citation omitted)). Finally, to the extent Long raises a challenge to the sufficiency of the evidence to prove he possessed the child pornography, our review is for the correction of errors at law. See *State v. Ortiz*, 905 N.W.2d 174, 179 (Iowa 2017).

III. Ineffective Assistance of Counsel—Jury Instruction.

Iowa Code section 728.12(3) provides, in part: "It shall be unlawful to knowingly purchase or possess a visual depiction of a minor engaging in a prohibited sexual act or the simulation of a prohibited sexual act." The code provision goes on to provide:

A visual depiction containing pictorial representations of different minors shall be prosecuted and punished as separate offenses for each pictorial representation of a different minor in the visual

depiction. However, violations of this subsection involving multiple visual depictions of the same minor shall be prosecuted and punished as one offense.

Iowa Code § 728.12(3). The jury was provided fifty separate exhibits the State asserted amounted to child pornography, and there were ten separate identical counts filed against Long, but none of the counts referenced a specific exhibit.

The single marshalling jury instruction provided:

The State must prove both of the following elements of Sexual Exploitation of a Minor:

1. On or about the 14th day of July, 2015, the defendant knowingly possessed a print or visual medium.
2. That print or visual medium shows a person under the age of 18 years:
 - a. engaging in a prohibited sexual act, or
 - b. engaged in the simulation of a prohibited sexual act.

The jury was then given ten separate verdict forms, and they indicated on each form that they found Long guilty of sexual exploitation of a minor.

Long contends the State did not put on evidence that the pictures were of at least ten different children and the jury was not given an instruction that it had to find ten separate children depicted in the exhibits of child pornography to find him guilty of ten counts. Because each count was not associated with a picture, Long contends there is a very good likelihood the jury was not unanimous on which of the photos served as the basis for the ten convictions. He therefore asserts his due process rights were violated. Acknowledging that trial counsel did not object to the marshalling jury instruction, Long claims counsel provided ineffective assistance.

To prove his claim of ineffective assistance, Long must prove by a preponderance of the evidence counsel failed to perform an essential duty and he

suffered prejudice as a result. See *State v. Clay*, 824 N.W.2d 488, 495 (Iowa 2012). “Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.” *Id.* (citations omitted). Thus, if we conclude that Long cannot establish prejudice, we need not address whether counsel breached an essential duty. See *State v. Lopez*, 872 N.W.2d 159, 169 (Iowa 2015) (“For most ineffective-assistance-of-counsel claims, the court may consider either the prejudice prong or breach of duty first, and failure to find either one will preclude relief.”).

As to the fifty exhibits the State alleged amounted to child pornography, Long claims “one picture was entered into evidence twice,” it looks to be the same child in exhibits 57 and 67, and it could be the same person in exhibit 12 and exhibit 27. Long also claims the child’s face is not visible or is obscured in fourteen exhibits. In addition, Long asserts four exhibits were collages of pictures, and one collage exhibit contained images of two different children. Finally, we note testimony established one of the collage exhibits depicted three different children. See Iowa Code § 728.12(3) (“A visual depiction containing pictorial representations of different minors shall be prosecuted and punished as separate offenses for each pictorial representation of a different minor in the visual depiction.”).

Even removing the exhibits Long claims are duplicative or alleges could involve the same child and removing the exhibits where Long asserts the child’s face is not visible or is obscured, the jury still had more than thirty pictures that were sufficient to support the ten counts against Long. The evidence produced at trial clearly contained images of more than ten different children engaged in a prohibited sexual act. See *id.* § 728.1(7) (defining prohibited sexual act). While

Long claims his due process rights were violated because counsel did not ensure that the jury differentiated between the charges, the jury was given an instruction providing:

The defendant has been charged with 10 counts. This is just a method for bringing each of the charges to trial. If you find the defendant guilty or not guilty on any one of the 10 counts, you are not to conclude the defendant is guilty or not guilty on the others. You must determine whether the defendant is guilty or not guilty separately on each count.

In *State v. See*, 805 N.W.2d 605, 607 (Iowa Ct. App. 2011), this court concluded the defendant failed to establish prejudice based on counsel's failure to object to undifferentiated marshalling jury instructions, in part, because there was evidence supporting each of the three counts of sexual abuse and the jury was instructed to consider the defendant's guilt separately on each count.¹ While we agree the better practice may have been to assign a photograph to each of the ten counts so it is clear which photograph the jury used to reach each of its verdicts, we conclude the result would have been the same had counsel objected and the jury instruction had been modified. See *Lopez*, 872 N.W.2d at 169 ("Prejudice is generally found only if 'but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (citations omitted)); see also *State v. White*, No. 12-1256, 2013 WL 4504896, at *4 (Iowa Ct. App. Aug. 21, 2013) (noting the victim described more than three incidents of sexual abuse and the defendant

¹ We disagree with Long's assertion that the concurring opinion in *State v. James*, No. 13-1067, 2014 WL 4230203, at *8-9 (Iowa Ct. App. Aug. 27, 2014) (Tabor, J., concurring specially), mandates a new trial in this case. The *James* case dealt with the State charging "two separate crimes involving two distinct injuries to two different victims" in one jury instruction. 2014 WL 4230203, at *8. In this case, the jury instruction charged only one crime, and the jury had to find Long committed the crime ten times. Because there was evidence to support the conclusion the crime occurred more than ten times, we find no prejudice in counsel's failure to object to the jury instruction.

could not establish prejudice due to the three undifferentiated jury instructions). Because Long cannot establish he was prejudiced by counsel's failure to object to the jury instructions, we deny his ineffective-assistance claim.

IV. Admission of Photographs.

Next, Long asserts the court abused its discretion in admitting fifty child pornography exhibits when the State only charged ten counts. He claims the number of images was excessive and the probative value was substantially outweighed by the prejudicial effect of so many images. According to Long, the number of images served no purpose but to inflame the emotions of the jury, and the State should have been limited to the number of images constituting the crimes charged.

The State supported the admission of the extra images to counter the anticipated defense of mistake of fact—it was less likely Long mistakenly possessed the child pornography images discovered amongst his other pornographic material due to the sheer number of child pornography images. While the State sought to admit 114 images of child pornography and ten images of child erotica, the district court limited the State to fifty child pornography images and five child erotica images.

“Ordinarily, the test of admissibility of photographs is relevancy and materiality.” *Hunt*, 801 N.W.2d at 374 (citation omitted). Relevant evidence is generally admissible, see Iowa R. Evid. 5.402, but relevant evidence may be excluded “if its probative value is substantially outweighed by a danger of . . . unfair prejudice,” see Iowa R. Evid. 5.403. “Evidence that ‘appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers

other mainsprings of human action [that] may cause a jury to base its decision on something other than the established propositions in the case' is unfairly prejudicial." *State v. Henderson*, 696 N.W.2d 5, 10–11 (Iowa 2005) (alteration in original) (citation omitted).

We agree the images admitted in this case are at a minimum distasteful, shocking, and deplorable, but that is the nature of the charged offenses. See *State v. Munz*, 355 N.W.2d 576, 580 (Iowa 1984) ("The photographs were, to put it mildly, explicit. Considered outside the factual context of this case, they could even be characterized as shocking. But the crimes charged were shocking"); *State v. Fuhrmann*, 257 N.W.2d 619, 625 (Iowa 1977) ("The grisly nature of these photographs is an unavoidable result of the nature of the killing."). The concern with unfairly prejudicial evidence is that the jury could "base its decision on something other than the established propositions in the case." *Henderson*, 696 N.W.2d at 10–11. The "extra" images Long contends were unfairly prejudicial were of the exact same type of evidence as the images that proved the charges against him. See *State v. Larsen*, 512 N.W.2d 803, 808 (Iowa Ct. App. 1993) ("[T]he uncharged crime 'did not involve conduct any more sensational or disturbing' than the charged crime, so as to warrant exclusion under Iowa Rule of Evidence [5.]403." (citation omitted)). We therefore conclude the extra images were not unfairly prejudicial, and the district court did not abuse its discretion in admitting fifty images of child pornography.

V. Sufficiency of the Evidence.

Finally, Long filed a pro se brief in this case challenging a number of factual statements contained in the State's appellate brief and appearing to dispute the

jury's finding he possessed child pornography. We interpret this brief as a challenge to the sufficiency of the evidence supporting his convictions. He does not challenge the conclusion that the images show persons engaged in a prohibited sexual act, but he claims the officer who testified as to the approximate age of the children in the photos was not an expert on aging,² and he also asserts he did not possess the images.

In a sufficiency-of-the-evidence challenge,

[w]e view the evidence "in the light most favorable to the State, including all reasonable inferences that may be fairly drawn from the evidence." We uphold the verdict if substantial evidence in the record supports it. "Evidence is . . . substantial if, when viewed in the light most favorable to the State, it can convince a rational jury that the defendant is guilty beyond a reasonable doubt."

Ortiz, 905 N.W.2d at 180 (citations omitted).

The State presented evidence that the child pornography was found in a tote Long admitted to owning, amongst his other pornographic material and other personal effects, in his closet in his locked bedroom at the Freedom Home Ministries house. While Long testified at trial there was another resident in the house that held a grudge against him and the bedroom locks could be overpowered with a butter knife, the jury was free to disregard his testimony. *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012) ("Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury [is] free to reject certain evidence, and credit other evidence." (alteration in original) (citation

² We note defense counsel did not challenge the admissibility of the State's expert witness, who testified as to the pictures and the approximate age of the children depicted. However, we bypass the error-preservation concern and address the claim on the merits. See *State v. Taylor*, 596 N.W.2d 55, 56 (Iowa 1999) (choosing to pass over "serious preservation-of-error problems" and address the merits of the claim).

omitted)). In addition, the State's expert witness described for the jury her training in identifying and categorizing child pornography, which included determining the age of individuals depicted in the images, and the expert explained for the jury precisely how she determined the approximate age of each child pictured. We conclude substantial evidence supports the jury's verdicts, and we affirm Long's convictions and sentences.

VI. Conclusion.

We conclude Long failed to prove counsel was ineffective in failing to object to the undifferentiated jury instruction because he cannot prove the result of the trial would have been different had counsel made such an objection. In addition, the court did not abuse its discretion in admitting the fifty images of child pornography in light of the nature of the case. Finally, we conclude the evidence was sufficient to prove Long possessed the child pornography. Long's convictions are affirmed.

AFFIRMED.