

**IN THE COURT OF APPEALS OF IOWA**

No. 6-910 / 05-1980  
Filed December 13, 2006

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**MARK ANTHONY ELSTON,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Pottawattamie County, James S. Heckerman, Judge.

Defendant appeals following his jury trial, judgment, and sentence to the charge of indecent contact with a child-enhanced, in violation of Iowa Code sections 709.12 and 901A.2(1) (2005). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Martha Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Shelly Sedlak, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

**SACKETT, C.J.**

Defendant Mark Elston appeals following his jury trial, judgment, and sentence to the charge of indecent contact with a child-enhanced, in violation of Iowa Code sections 709.12 and 901A.2(1) (2005). Elston contends (1) the district court abused its discretion in failing to sever the charge of indecent contact from the other pornography charges, and (2) his counsel was ineffective for (a) failing to object to testimony that he possessed adult pornography, and (b) failing to request a jury instruction explaining the proper consideration of evidence as it related to the dismissed counts. We affirm.

Elston was charged with sexual exploitation of minor (count I), in violation of section 728.12(1); indecent contact with a child (counts II and III), in violation of section 709.12(2); and sexual exploitation of a minor (counts IV-XX), in violation of sections 728.12(3) and 728.1(7)(g), for acts alleged between July 1, 2003 and February 11, 2005.

Elston filed a motion to sever the charges against him. The district court denied the motion. At the close of the trial the district court sustained defendant's motion for judgment of acquittal on count I and counts III through XX. The jury found the defendant guilty on the remaining count II, indecent contact with a child. Defendant filed a post-trial motion asserting the district court had erred in refusing to sever the charges. Elston appeals the district court's denial of his motion to sever.

Iowa Rule of Criminal Procedure 2.6(1) allows joinder of charges when

[t]wo or more indictable public offenses which arise from the same transaction or occurrence or from two or more transactions or occurrences constituting parts of a common scheme or plan, when alleged and prosecuted contemporaneously, shall be alleged and

prosecuted as separate counts in a single complaint, information or indictment, unless, for good cause shown, the trial court in its discretion determines otherwise.

We look to whether the charges are part of a “common scheme or plan” and factors to determine this include modus operandi, continuing motive, and temporal and geographic proximity. *State v. Delaney*, 526 N.W.2d 170, 174 (Iowa Ct. App. 1994). Further, it is the defendant’s burden to demonstrate he had been prejudiced by the joinder. *State v. Lam*, 391 N.W.2d 245, 251 (Iowa 1986). The district court did not abuse its discretion by denying defendant’s motion to sever.

Elston also raises a claim of ineffective assistance of counsel for failing to object to testimony of his possession of adult pornography and failing to request a jury instruction explaining the proper consideration of evidence. Ordinarily, we preserve ineffectiveness claims raised on direct appeal for postconviction relief to allow full development of the facts surrounding counsel’s conduct. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). Therefore, because the record is not fully developed on these issues, we preserve them for possible postconviction relief proceedings.

**AFFIRMED.**