

NOTICE
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NO. 4-09-0766

Order filed 3/8/11

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Douglas County
DOUGLAS R. McKIBBEN,)	No. 08CF114
Defendant-Appellant.)	
)	Honorable
)	Michael G. Carroll,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court. Justices McCullough and Myerscough concurred in the judgment.

ORDER

Held: Where defendant reproduced a picture of female children in a setting involving the lewd exhibition of their unclothed genitals and breasts, the trial court did not err in finding him guilty of the offense of child pornography.

In June 2009, the trial court found defendant, Douglas R. McKibben, guilty of child pornography. In September 2009, the court sentenced him to six months in jail and four years of probation.

On appeal, defendant argues the trial court erred in finding a photograph in evidence was lewd and constituted child pornography. We affirm.

I. BACKGROUND

In August 2008, the State charged defendant by information with two counts of child pornography. In count I, the

State alleged defendant knowingly reproduced a photograph of a child depicted or portrayed in a pose, posture, or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks, or female breasts. 720 ILCS 5/11-20.1(a)(2), (a)(1)(vii) (West 2008). In count II, the State alleged defendant knowingly possessed a photograph, or other similar visual reproduction or depiction by computer, of a child depicted or portrayed in a pose, posture, or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks, or female breasts. 720 ILCS 5/11-20.1(a)(6), (a)(1)(vii) (West 2008). Defendant pleaded not guilty.

In December 2008, defendant was found unfit to stand trial. In March 2009, defendant was found to have been restored to fitness. He then waived his right to a jury trial.

In May 2009, defendant's stipulated bench trial commenced. The State and defense counsel entered into a stipulation of facts, which indicated defendant took a Sandisk media card to Dick's Pharmacy in Arthur on August 19, 2008. There, he reproduced 36 photographs from the card on a digital photograph print machine. These photos were submitted to the trial court as joint exhibit No. 1.

Once defendant paid for the prints and left, pharmacy employees called the police. Officers spoke with defendant at his residence, and he stated he had taken some of the photos and

others had been obtained through the Internet. The police took a flash card, which was later determined to contain 172 digital photographic images. These photos were submitted on a computer disk to the trial court as joint exhibit No. 2.

The stipulation indicated defendant acknowledged he was aware that certain images on the flash card he reproduced at the pharmacy were of nude children. He also acknowledged some of the children depicted may have been as young as nine years old and he derived some sexual gratification from the photographs.

In June 2009, the trial court issued its written ruling. The court applied the six-factor test set forth in *People v. Lamborn*, 185 Ill. 2d 585, 592, 708 N.E.2d 350, 354 (1999), which looks at the following:

"(1) whether the focal point of the visual depiction is on the child's genitals; (2) whether the setting of the visual depiction is sexually suggestive, *i.e.*, in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to

engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer."

The trial court noted the State had conceded that none of the photographs suggested sexual coyness under the fifth *Lamborn* factor.

The trial court applied the six-factor test to photo No. 2 from exhibit No. 1 (hereinafter the pyramid photo), which showed four young nude girls forming a cheerleader-type pyramid. As to the first factor, the court found the pubic areas and breasts were clearly displayed. Further, the court noted the head of the girl atop the pyramid was cut off, indicating perhaps the genital display and general nudity were more important to the photographer than the children themselves.

As to the second factor, the trial court found the setting was not sexually suggestive. As to the third factor, the court stated that, although young girls in a cheerleading pyramid pose is not unnatural, it was unnatural and unusual for nude young women to be forming a pyramid outside of a building. On the fourth factor, the court found the children were fully nude.

As to the sixth factor, the trial court found the image "invites the viewer to perceive the image from some sexualized or [deviant] point of view." The court stated "[s]howing totally nude pubescent young girls in a staged pose of performing a

cheerleading routine caters to lurid sexual fantasies of those who prey on such fantasies and served primarily, if not only, to feed such deviant ideation." While the court acknowledged some might view the image as one capturing an uninhibited moment of spontaneity on the part of the girls, it concluded the photo seemed "highly staged and primarily for sexually deviant reasons."

The trial court held the pyramid photo involved a lewd exhibition of the unclothed genitals, pubic areas, or buttocks of minor children under the age of 18 years of age. As the parties stipulated defendant reproduced the picture from the flash card, the court found him guilty on count I. The court did not enter judgment on count II, finding it a lesser-included offense.

In September 2009, the trial court sentenced defendant to six months in jail with credit for time served. The court also sentenced him to four years of probation. This appeal followed.

II. ANALYSIS

Defendant argues his conviction must be vacated because the trial court erred in ruling the pyramid photo was lewd and constituted child pornography. We disagree.

Child pornography does not fall under the protection of the first amendment. *New York v. Ferber*, 458 U.S. 747, 764 (1982). This is so because "the use of children as subjects of

pornographic materials is harmful to the physiological, emotional, and mental health of the child." *Ferber*, 458 U.S. at 758. "Child pornography is particularly harmful because the child's actions are reduced to a recording which could haunt the child in future years, especially in light of the mass distribution system for child pornography." *Lamborn*, 185 Ill. 2d at 589, 708 N.E.2d at 353, citing *Ferber*, 458 U.S. at 759 n.10.

According to section 11-20.1(a)(1)(vii) of the Criminal Code of 1961 (Code), a person commits the offense of child pornography who photographs or depicts by reproduction any child whom he knows or reasonably should know to be under the age of 18 where such child is "depicted or portrayed in any pose, posture[,] or setting involving a lewd exhibition of the unclothed or transparently clothed genitals, pubic area, buttocks, or, if such person is female, a fully or partially developed breast of the child." 720 ILCS 5/11-20.1(a)(1)(vii) (West 2008). Whether the photographs constitute a "lewd exhibition" is a question of statutory construction that this court reviews *de novo*. *Lamborn*, 185 Ill. 2d at 590, 708 N.E.2d at 354 see also *People v. Sven*, 365 Ill. App. 3d 226, 231, 848 N.E.2d 228, 232 (2006) (*de novo* standard is used to determine whether an image is lewd); *People v. Lewis*, 305 Ill. App. 3d 665, 677, 712 N.E.2d 401, 409 (1999).

Under Illinois law, "lewd" has been defined as "[o]bscene, lustful, indecent, lascivious, [or] lecherous."

Lamborn, 185 Ill. 2d at 591, 708 N.E.2d at 354, quoting *People v. Walcher*, 162 Ill. App. 3d 455, 460, 515 N.E.2d 319, 323 (1987), quoting Black's Law Dictionary 817 (5th ed. 1981). "Nudity without lewdness is not child pornography." *Lamborn*, 185 Ill. 2d at 594, 708 N.E.2d at 355. The supreme court has set forth six factors to consider in determining whether a photograph of a child constitutes "the lascivious or lewd exhibition of the genitals," including:

"(1) whether the focal point of the visual depiction is on the child's genitals; (2) whether the setting of the visual depiction is sexually suggestive, *i.e.*, in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Lamborn*, 185 Ill. 2d at 592, 708 N.E.2d at 354.

The visual depiction of the minor need not involve all of the listed factors to be considered lewd. *Lamborn*, 185 Ill. 2d at 592, 708 N.E.2d at 355. Instead, "the determination of whether the visual depiction is lewd will involve an analysis of the overall content of the depiction, taking into account the age of the minor." *Lamborn*, 185 Ill. 2d at 592-93, 708 N.E.2d at 355. A court's determination on lewdness is made on a case-by-case basis. *Lamborn*, 185 Ill. 2d at 593, 708 N.E.2d at 355.

In the case *sub judice*, defendant does not contest that he reproduced the pyramid photo or that the girls in the photo are under the age of 18. The question instead centers on whether the photo can be considered lewd. The supreme court has stated courts of appeal must review the photographs themselves to determine whether they are lewd under the child pornography statute. *Lamborn*, 185 Ill. 2d at 590, 708 N.E.2d at 354.

We now turn to the pyramid photo at issue and the six factors set forth in *Lamborn*. The photo consists of three young girls making the bottom layer of the pyramid and one girl standing behind them in the middle and forming the top. The girls on the end of the pyramid base have their outermost arm raised to hold the hand of the girl on the top of the pyramid to help her balance. All four of the girls are nude. The bottom three girls are shown from the knees up and their pubic areas and breasts are exposed. The photo cuts off the head of the girl on top of the

pyramid but her pubic area and breasts are shown. It appears two other individuals are bending over behind the three girls on the bottom and supporting the girl standing on top of the pyramid. These two individuals are obscured and their private parts cannot be seen.

The first factor centers on "whether the focal point of the visual depiction is on the child's genitals." *Lamborn*, 185 Ill. 2d at 592, 708 N.E.2d at 354. In *People v. Johnson*, 186 Ill. App. 3d 116, 122, 542 N.E.2d 143, 147 (1989), many of the pictures deemed to be lewd focused "on the breasts, vaginas, and buttocks of young girls," and showed "nothing more than the stomach, thighs[,] and genitals of these children." In contrast, in *People v. Wayman*, 379 Ill. App. 3d 1043, 1057, 885 N.E.2d 416, 427-28 (2008), the testimony established that two of the pictures showed "full views" of the naked minor but her vaginal area and buttocks were not the focal point. Likewise, in *Lewis*, 305 Ill. App. 3d at 678, 712 N.E.2d at 410, the photo found not to be lewd depicted the minor's entire body and was not focused on her genitals.

Relying on *Wayman* and *Lewis*, defendant argues that "where all or nearly all of the child's body is shown in the photograph, the child's genitals are not the focal point just because the genitals or breasts are clearly visible." However, we find those cases distinguishable. Here, the picture shows

four nude girls, not one. Further, whether intentional or not, the cropped nature of the photo, cutting off the head of the girl on the top of the pyramid and below the knees of the girls on the bottom, puts the focus on the genitalia and breasts of the girls as a group.

Defendant seems to argue that as long as the picture is wide enough to include a full view of the child, or close thereto, or the genitalia and breasts are not perfectly centered in an inch-by-inch square in the middle of the photo, then it cannot be deemed lewd. We do not believe this is the law, especially as applied to this case. With the cropped nature of the photo, along with one girl on the upper half of the picture and three other girls on the bottom, the focus of the picture is the minors' genitals and breasts, and nothing in the photo detracts from that focus. This factor weighs in favor of lewdness.

The second factor is "whether the setting of the visual depiction is sexually suggestive, *i.e.*, in a place or pose generally associated with sexual activity." *Lamborn*, 185 Ill. 2d at 592, 708 N.E.2d at 354. It appears the pyramid photo was taken outside in front of the brick wall of a building. This setting does not suggest sexual activity. See *Sven*, 365 Ill. App. 3d at 232, 848 N.E.2d at 234 (the bathroom setting was not sexually suggestive); *Lewis*, 305 Ill. App. 3d at 678, 712 N.E.2d at 410 (a bedroom with a "made-up bed" did not suggest sexual

activity). As the setting is not sexually suggestive, this factor does not weigh in favor of lewdness.

The third factor deals with "whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child." *Lamborn*, 185 Ill. 2d at 592, 708 N.E.2d at 354. Here, the photo shows four 10- to 12-year-old girls performing a cheerleader pyramid, which is not unnatural *per se* as young girls often participate in such maneuvers while cheerleading. However, all the girls are naked. Defendant argues "the element of nudity is not a part of this criterion." *Wayman*, 379 Ill. App. 3d at 1057, 885 N.E.2d at 428. But the factor looks at whether the children are in inappropriate attire. Here, the girls are without attire, and a cheerleading pyramid is an unnatural pose for nude children. *Cf. Lamborn*, 185 Ill. 2d at 595, 708 N.E.2d at 356 (finding pictures of topless 13-year-olds pictured standing next to naked 61-year-old man was an unnatural pose and involved inappropriate attire); *Wayman*, 379 Ill. App. 3d at 1057, 885 N.E.2d at 428 (finding a nude girl standing and looking forward into and back at a camera were not unnatural poses); *Sven*, 365 Ill. App. 3d at 233, 848 N.E.2d at 234 (finding tape showing young woman bathing an infant did not depict the victim in an unnatural pose); *Lewis*, 305 Ill. App. 3d at 678, 712 N.E.2d at 410 (finding naked girl with arms at her side and her head slightly down was not an unnatural pose). This factor

weighs in favor of finding the image is lewd.

The fourth factor focuses on "whether the child is fully or partially clothed, or nude." *Lamborn*, 185 Ill. 2d at 592, 708 N.E.2d at 354. Here, this factor weighs in favor of lewdness as all of the girls are nude.

The fifth factor is "whether the visual depiction suggest sexual coyness or a willingness to engage in sexual activity." *Lamborn*, 185 Ill. 2d at 592, 708 N.E.2d at 354. The State conceded the images did not suggest sexual coyness. The trial court noted the State's concession and found the factor was not in play. This factor does not weigh in favor of lewdness.

The sixth factor focuses on "whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Lamborn*, 185 Ill. 2d at 592, 708 N.E.2d at 354. This factor refers to an "objective" viewer. *Lamborn*, 185 Ill. 2d at 594, 708 N.E.2d at 355; see also *Lewis*, 305 Ill. App. 3d at 678, 712 N.E.2d at 410. The Second District has found "the proper inquiry focuses upon whether the image invites the viewer to perceive the image from some sexualized or deviant point of view." *Sven*, 365 Ill. App. 3d at 238, 848 N.E.2d at 239.

Here, we conclude the pyramid photo was intended or designed to elicit a sexual response in the eyes of the viewer. Four girls are grouped together with the focus of the picture being on their breasts and genitals. The photo depicts the girls

in a pose involving a lewd exhibition, inviting the viewer to perceive the image from some sexualized or deviant point of view. This factor weighs in favor of lewdness.

In this case, the first, third, fourth, and sixth factors articulated in *Lamborn* indicate the photograph is lewd and therefore child pornography within the meaning of section 11-20.1 of the Code. Thus, defendant's conviction on count I must be affirmed.

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

Affirmed.