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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Boone County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10-CF-171
)	
ALFRED L. FREEBURG,)	Honorable
)	C. Robert Tobin, III,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* Because the photograph was not “lewd” under the aggravated child pornography statute, we reversed defendant’s convictions as to counts III and IV and remanded the case for resentencing.

¶ 2 The issue on appeal is whether one photograph is “lewd” under the aggravated child pornography statute. 720 ILCS 5/11-20.3(a)(1)(vii) (West 2010). We determine that the photograph is not lewd and therefore reverse and remand the case for resentencing on the remaining counts.

¶ 3 I. BACKGROUND

¶ 4 Defendant, Alfred L. Freeburg, was charged by indictment with six counts of aggravated child pornography under three different provisions of the aggravated child pornography statute (720 ILCS 5/11-20.3 (West 2010)). The counts ranged from the possession of lewd photographs of children under the age of 13 (Class 2 felony) to the lewd photographing or depiction by computer of children under the age of 13 (Class X felony). A search of defendant's closet revealed 41 photographs depicting naked children, and four of these photographs formed the basis of the six charges.

¶ 5 The relevant count for purposes of this appeal, count III, alleged that between March 1, 2009, and April 28, 2010, defendant committed the offense of aggravated child pornography in that he photographed or depicted by computer a child whom defendant knew to be under 13 years of age, "while the child was depicted in a pose involving the lewd exhibition of the unclothed genitals of the child, in that the child's vaginal area is depicted as she is standing next to a chair" in violation of section 11-20.3(a)(1)(vii) (720 ILCS 5/11-20.3(a)(1)(vii) (West 2010)).

¶ 6 After a bench trial, the trial court found defendant guilty of all six counts. Defendant then moved for a new trial. Based on defendant's motion, the court reversed its findings of guilt as to counts I and II. The court affirmed its findings of guilt as to counts III and IV, which were based on the same photograph, which is the photograph at issue on appeal. Because count IV was based on the possession of the photograph, a Class 2 felony, the court found it to be a lesser-included offense of count III, which was a Class X felony based on the creation of the photograph. Finally, the court affirmed its findings of guilt as to counts V and VI, which were based on the possession of two photographs. The two photographs pertaining to counts V and VI depict a different child than the photograph at issue on appeal. Nevertheless, the court found that counts V and VI were also lesser-included offenses of count III, in that they were based on

possession and not creation of a photograph. Accordingly, the court entered judgment on count III only. For count III, defendant was sentenced to six years' imprisonment and ordered to pay statutory fines and costs.

¶ 7 Defendant timely appealed. As stated, defendant challenges the court's lewd finding as to one photograph only, which is the basis of counts III and IV. Defendant does not challenge the court's guilt determination as to counts V and VI.

¶ 8 II. ANALYSIS

¶ 9 Defendant was convicted under section 11-20.3(a)(1)(vii) of the aggravated child pornography statute, which states that “[a] person commits the offense of aggravated child pornography who:

(1) films, videotapes, photographs, or otherwise depicts or otherwise portrays by means of any similar visual medium or reproduction or depicts by computer any child whom he or she knows or reasonably should know to be under the age of 13 years where such child is:

(vii) 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 or other person.”

(Emphasis added.) 720 ILCS 5/11-20.3(a)(1)(vii) (West 2010).

¶ 10 The dispositive issue in this case is whether the photograph is “lewd.” In *People v. Lamborn*, 185 Ill. 2d 585, 591 (1999), our supreme court noted that it had not previously defined “lewd.” The court then identified six factors used by other courts to assess whether a visual depiction of a child constitutes a lewd exhibition of the genitals: (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. *Id.* at 592.

¶ 11 The visual depiction need not involve all of these factors to be considered lewd; 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. Also, because the overall content is relevant, these factors are not all inclusive. *People v. Sven*, 365 Ill. App. 3d 226, 230 (2006). The “determination must be made on a case-by-case basis.” *Lamborn*, 185 Ill. 2d at 593.

¶ 12 We apply an objective standard in determining whether material is child pornography; defendant's intent does not create a lewd photograph out of the otherwise innocent activity of children, and whether the defendant was aroused by the photograph is irrelevant. *Lamborn*, 185 Ill. 2d at 594-95. We focus on the photograph itself, not on the effect that the photograph has on an individual viewer, when determining whether a photograph constitutes child pornography. *Id.* at 594. Because we review the photograph itself to determine whether it is lewd under the child pornography statute, rather than review the sufficiency of the evidence, our review is *de novo*. *Id.* at 590.

¶ 13 The photograph at issue is an 8½ by 11-inch, glossy, color depiction of a young girl, between the ages of 6 and 10. The girl is standing outdoors in front of a large, glass patio door, holding onto a lawn chair with both hands, with one arm behind her back. She is not wearing

any clothing, and her nipples or undeveloped chest and vagina are visible. The girl is looking down slightly, showing no awareness of a camera. Applying the six factors to this photograph, we determine that it is not lewd.

¶ 14 The first factor is not satisfied because the focal point is not on the child's chest or vagina. The photograph depicts the child's entire body, with the exception of her feet. As such, the child's entire body is the focus of the picture, as are her surroundings, which is a patio area with a large glass door and chair. See *Lamborn*, 185 Ill. 2d at 596 (a proper determination of whether a photograph is lewd requires a review of the overall content of the photograph). The child is not posed in such a way as to draw attention to her chest or genital area; she is simply standing straight up next to a chair. There are no close-ups or camera angles that focus on her chest or genitals.

¶ 15 With respect to this first factor, the State argues that it appears that the photograph has been edited or photo shopped in the areas of the child's chest and vagina. While we agree that the color of these areas in the photograph differs somewhat from the remainder of the child's body, any edits to the photograph do not create a focal point on the child's chest or genitals. As stated, the focus of the picture is on the child's entire body in an outdoor setting. Moreover, assuming that the photograph was edited, we cannot consider defendant's subjective intent in taking or editing the photograph because such evidence is irrelevant. See *Lewis*, 305 Ill. App. 3d 665, 676-77 (1999) (neither the circumstances surrounding the taking of the photos nor the defendant's intent in taking the photos was relevant to the determination of whether the photos were lewd). Rather, the photograph speaks for itself (*id.* at 677), and any editing has not transformed the photograph into one that makes the chest or vagina a focal point.

¶ 16 Likewise, factor two is not satisfied because the setting is not sexually suggestive or a place generally associated with sexual activity. Again, the setting is outdoors, with the child standing in front of a large glass patio door next to a lawn chair. The setting is not a bedroom or other location normally associated with sexual activity, and the State makes no argument that factor two applies.

¶ 17 Regarding factor three, the child is not wearing inappropriate attire or posed in an unnatural way. The child is merely standing next to a lawn chair, with both hands holding on to it, with one arm behind the back. While the State argues that the child is deliberately posed in a manner that projects her torso, we disagree. There is nothing unnatural or suggestive about the child's pose. On the contrary, the child is standing straight up next to the lawn chair, looking down slightly, seemingly oblivious to a camera.

¶ 18 Turning to factor four, this factor is satisfied because the child is nude. However, “[n]udity without lewdness is not child pornography” (*Lamborn*, 185 Ill. 2d at 594), and as we explain, this is the only factor satisfied in this case.

¶ 19 Like factors one through three, factors five and six are lacking. There is nothing about the child or the remainder of the photograph that suggests sexual coyness or a willingness to engage in sexual activity. As stated, the child is looking down and there is nothing sexual about her facial expression. Her pose is natural for an outdoor setting. Finally, there is nothing in the photograph that is intended to elicit a sexual response. As this court stated in *Sven*, 365 Ill. App. 3d at 238, the proper inquiry focuses upon whether the image invites the viewer to perceive the image from some sexualized or deviant point of view. The photograph at issue does not have this effect but merely captures an inhibited moment of prepubescent spontaneity. See *Lamborn*,

185 Ill. 2d at 591-92 (noting that a relevant consideration was whether the photographs merely captured an uninhibited moment of adolescent spontaneity).

¶ 20 Accordingly, the only factor present in this case is factor four, and the photograph is not lewd. See *Lewis*, 305 Ill. App. 3d at 678 (the photo at issue was “nudity without lewdness,” in that five of the six factors listed in *Lamborn* weighed against a determination of lewdness).

¶ 21 Given our conclusion that the photograph is not lewd under the aggravated child pornography statute, we reverse defendant’s conviction as to count III, a Class X felony (720 ILCS 5/11-20.3(c) (West 2010)) based on the creation of the photograph. We also reverse defendant’s conviction as to count IV, because it is based on defendant’s possession of the same photograph. We remand the case for resentencing as to the remaining counts (counts V and VI).

¶ 22 On remand, we note the following. When sentencing defendant, the trial court determined that counts V and VI, based on possession, were lesser-included offenses of count III. It is questionable whether this result was proper given this court’s recent decision in *People v. Murphy*, 2013 IL App (2d) 120068. In *Murphy*, this court held that images of multiple children constitute multiple offenses under the aggravated child pornography statute. *Id.* ¶ 10. As stated, the two photographs pertaining to counts V and VI depict a different child than the child in the photograph at issue on appeal. In any event, the State has not raised this issue, and it is moot given this court’s reversal of counts III and IV. We remand the case for resentencing as to counts V and VI.

¶ 23 **III. CONCLUSION**

¶ 24 For the foregoing reasons, counts III and IV are reversed, and the case is remanded for resentencing.

¶ 25 Reversed and remanded.