No. 2—10—0051
Order filed June 27, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Stephenson County.
Plaintiff-Appellee,	)	
v.	)	No. 09—CF—0074
MARSHALL C. HOLLINS,	)	Honorable Michael P. Bald,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

Held: The child pornography statute did not violate defendant's right to due process and equal protection when defendant photographed a 17-year-old victim during the course of consensual intercourse; and three convictions of child pornography stemming from multiple photographs taken during the course of one sexual encounter does not violate the one-act, one-crime doctrine.

Following a bench trial, defendant, Marshall C. Hollins, was convicted of three counts of child pornography pursuant to sections 11—20.1(a)(i), (ii) and (a)(4) of the Criminal Code of 1961 (the child pornography statute) (720 ILCS 5/11—20.1(a)(i), (ii), and (a)(4) (West 2008)). The conviction resulted from defendant taking photographs of the victim, who was 17, during the course

of a sexual encounter. The trial court sentenced defendant to concurrent terms of eight years' imprisonment for each count. Defendant now appeals his convictions, raising two issues: (1) whether the child pornography statute is unconstitutional as applied to him; and (2) whether his conviction violates the one-act, one-crime doctrine. We affirm.

I. BACKGROUND

The relevant facts are not in dispute. In March 2009, defendant was charged with three counts of child pornography. Defendant filed a pretrial motion seeking to declare portions of the child pornography statute unconstitutional. After hearing oral arguments, the trial court denied the motion. Defendant subsequently waived his right to a jury trial.

The parties submitted three stipulations to the trial court. The first stipulation stipulated that Detective Jim Drehoble of the Freeport Police Department would testify that the victim's mother brought the victim to the police department to report that the 17-year-old victim was having sex with the 32-year-old defendant. The victim's mother showed Drehoble four or five photographs of an erect penis penetrating a vagina. The victim's mother told Drehoble that the pictures were sent to the victim via email from an email address she knew belonged to defendant. The victim's mother told Drehoble she could identify the victim in the picture due to the nature of the pubic area. Drehoble would further testify that he interviewed defendant, who acknowledged he knew the victim's birth date and that she was 17 years of age when they had intercourse. Defendant admitted taking pictures of himself having sexual intercourse with the victim and that he knew the victim was under the age of 18 when the pictures were taken.

The second stipulation stipulated that the victim would testify that she first met defendant when she was 16 years of age, but their relationship at that time was not sexual. The victim then saw defendant again at Highland College when she was 17 years old. The victim would testify that she began a consensual sexual relationship with defendant and that during one sexual encounter, defendant took photographs of himself and the victim as his penis penetrated her vagina. The victim would further testify that she reported her relationship with defendant to Drehoble on December 1, 2008, and she did not have any further sexual encounters with defendant after that date.

The third stipulation stipulated that the victim's mother would testify that she gave birth to the victim on February 8, 1991, and that the victim attended Highland College. The victim's mother would testify that she knew defendant because he was a former foster child of her mother, the victim's grandmother. The victim's mother would testify that she brought pictures to Drehoble depicting a penis and a vagina that she obtained on the victim's email. The pictures were sent from an email address that the victim's mother knew belonged to defendant. The victim's mother emailed copies of the photographs to Drehoble. The victim's mother would testify that she knew the pictures were of the victim.

The trial court found defendant guilty of three counts of child pornography and sentenced him to concurrent terms of 8 years' imprisonment for each count. Defendant timely appealed after the trial court denied his motions for a new trial and reconsideration of sentencing.

II. DISCUSSION

A. Due Process and Equal Protection

The first issue defendant raises is whether the child pornography statute is unconstitutional. Defendant maintains that the statute, as applied to him, violates his constitutional right to due process and equal protection because the pictures were of a 17-year-old who legally consented to the sexual activity and the photographs. The gravamen of defendant's argument is that criminalizing the depiction of consensual sexual activity involving a 17-year-old person is not rationally related to the child pornography statute's purpose of protecting children from being sexually abused and exploited.

Our analysis begins with the well-settled maxim that a statute is presumed constitutional and the party challenging the constitutionality bears the burden of establishing its invalidity. *People v. Jones*, 223 Ill. 2d 569, 595-96 (2006). Pursuant to its police powers, the legislature has wide latitude in determining the public interest and welfare, and the measures necessary to secure those interests. This discretion, however, is limited by the constitutional guarantee that a person may not be deprived of liberty without due process of law. *People v. Williams*, 394 Ill. App. 3d 286, 292 (2009) (citing *In re K.C.*, 186 Ill. 2d 542, 550 (1999)). The first step in determining whether a statute violates a defendant's constitutional rights to due process or equal protection is to ascertain the nature of the right the statute purportedly infringes upon. *In re D.W.*, 214 Ill. 2d 289, 310 (2005). When a fundamental right is not implicated, a court applies the rational basis test and a statute will be held constitutional so long as it bears a rational relationship to a legitimate state interest. *Id.* The rational basis test is highly deferential (*People v. Botruff*, 212 Ill. 2d 166, 176-77 (2004)), and described by the Supreme Court as the "paradigm of judicial restraint" (*Federal Communications Comm'n v. Beach Communications*, 508 U.S. 307, 314 (1993)). Conversely, "the strict scrutiny test applies if

the court finds that the statute affects either a fundamental right or discriminates against a suspect class." *People v. Carter*, 377 Ill. App. 3d 91, 99 (2007) (citing *People v. Shephard*, 152 Ill. 2d 489, 500 (1992)). To survive strict scrutiny, the legislative measure must be necessary to achieve a compelling interest and narrowly tailored to achieve that goal. *People v. Cornelius*, 213 Ill. 2d 178, 204 (2004). In other words, "the legislature must employ the least restrictive means consistent with the attainment of the intended goal." *Id.* Fundamental interests are generally "those that lie at the heart of the relationship between the individual and a republican form of nationally integrated government" (*People v. Kaeding*, 98 Ill. 2d 237, 246 (1983) (quoting *People ex rel. Tucker v. Kotsos*, 68 Ill. 2d 88, 97 (1977))), and are rooted in explicit or implicit constitutional guarantees. *Kaeding*, 98 Ill. 2d at 246. The child pornography statute does not affect a fundamental right, and therefore, we will review the statute as applied to defendant under the rational basis test. See *People v. Downin*, 357 Ill. App. 3d 193, 199-200 (2005) (noting that the United States Supreme Court in *Lawrence v. Texas*, 539 U.S. 588 (2003), stated that, although liberty gives substantial protection in conducting their personal lives in matters pertaining to sex, the Court did not conclude that sexual activity is a fundamental right and further expressed that its holding did not apply to minors).

We are unaware of any Illinois court decision addressing the constitutional implications when the victim is legally able to consent to the sexual activity. However, the Nebraska Supreme Court previously addressed whether its child pornography statute violated the defendant's federal and state constitutional rights after he videotaped a minor having sex with him even though the minor legally consented to sexual activity. See *State of Nebraska v. Senters*, 270 Neb. 19 (2005). In *Senters*, the

defendant was a 28-year-old school teacher who videotaped himself having sex with his 17-year-old girlfriend. *Id.* at 20. Although Nebraska law permitted a 17 year old to consent to sexual activity, the defendant was convicted of violating Nebraska's child pornography statute and sentenced to two years' probation. *Id.* at 22. Claiming that the statute violated his constitutional right to due process, privacy, and equal protection, the defendant appealed. *Id.* at 21.

On appeal, the court held that the child pornography statue did not violate the defendant's right to privacy and equal protection. The court, citing *Lawrence*, applied a rational basis level of review and concluded that the prohibition of visually depicting sexually explicit conduct by a person less than 18 years old was rationally related to the state's legitimate interest in banning child pornography. *Id.* at 25-26. In reaching its determination, the Nebraska Supreme Court noted that child pornography is associated with child abuse and exploitation and often results in physical and psychological harm to the child. *Id.* The court concluded:

> "Even for those who record an intimate act and intend for it to remain secret, a danger exists that the recording may find its way into the public sphere, haunting the child participant for the rest of his or her life. It is reasonable to conclude that persons 16 and 17 years old, although old enough to consent to sexual relations, may not fully appreciate that today's recording of a private intimate moment may be the Internet's biggest hit next week." *Id.*

The court held that Nebraska's child pornography statute provided sufficient notice to the defendant regarding who is a child under the statute. Therefore, the statute did not violate his right to

procedural due process because the legislature expressly stated that persons under the age of 18 were considered children under the act. *Id.* 28-29.

We find the Nebraska Supreme Court's reasoning in *Senters* persuasive. Our supreme court also recognizes that the State has a legitimate interest in prohibiting child pornography. See *People v. Lamborn*, 185 Ill. 2d 585, 589 (1999) ("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."). This view is consistent with numerous United States Supreme Court cases acknowledging that states have an interest in regulating child pornography. *E.g., New York v. Ferber*, 458 U.S. 747, 756-57 (1982) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling' [citation]."). We also agree with the Nebraska Supreme Court that prohibiting the depiction of persons under the age of 18 engaging in sexual acts is rationally related to the state's interest in protecting minors from chid pornography. Although 17 year olds can legally consent to sexual activity in Illinois, there is a danger they will not adequately comprehend the consequences of recording a private, intimate moment. Therefore, because we must presume that a statute is constitutional (*Jones*, 223 Ill. 2d at 595-95) and the rational basis test is highly deferential (*Botruff*, 212 Ill. 2d at176-77), we conclude that child pornography statute is rationally related to the State's legitimate interest in protecting children from the perils of child pornography and does not violate defendant's right to due process.

Moreover, we further reject defendant's argument that the child pornography statute violates his right to equal protection. Under an equal protection analysis, we will apply the rational basis test when the statute does not affect a suspect class and either strict scrutiny or an intermediate level of scrutiny if the statute does affect a suspect class. *Id.* (stating classifications based on race, national origin, sex, and illegitimacy are subject to a heightened standard of review, while the court employs the rational basis test in all other cases). Here, defendant does not claim to be a member of a suspect class, so we will apply the rational basis test to his equal protection claim. For the reasons already stated, we conclude that the child pornography statute does not violate defendant's right to equal protection because it is rationally related to the State's interest in protecting children from the dangers associated with child pornography.

Finally, we also reject defendant's assertion that the child pornography statute violates his constitutional right to due process and fair notice because the statute creates a "legislative trap" for people who have consensual sex with a 17 year old. The fair-warning requirement embodied in the Due Process clause prohibits States from holding an individual criminally responsible for conduct he or she could not reasonably understand to be proscribed. *People v. Geever*, 122 Ill. 2d 313, 330 (1988). However, impossible standards of specificity are not required to provide sufficient notice of proscribed conduct; rather, a court will assume that absent a contrary legislative intent, the words in a statute are based on their ordinary and popularly understood meanings. *Id.* (citing *People v. Parkins*, 77 Ill. 2d 253, 256-57 (1999)). Section 11—20.1(a)(1) of the child pornography statute expressly provides that a person commits the offense of child pornography by depicting a child he

or she knows or reasonably should know is under the age of 18. Therefore, the statute does not violate defendant's due process right to fair notice because it provided defendant with sufficient notice of the proscribed conduct. See *Stevens*, 270 Neb. at 29 ("the Legislature has expressly set out that participants in a visual depiction of sexually explicit conduct under the age of 18 are children. That is enough notice to satisfy due process.").

B. One Act, One Crime

The second issue on appeal is whether defendant's conviction of three counts of child pornography violated the one-act, one-crime doctrine. Defendant contends that his multiple convictions were based on a single act because his three convictions stem from photographing the victim during the single sexual encounter. According to defendant, two of his convictions should be vacated because they violate the one-act, one-crime doctrine.

Before addressing the merits of defendant's contention, we note that defendant did not raise this issue before the trial court. Generally, failure to raise an issue before the trial court results in forfeiture. *People v. Morgan*, 385 Ill. App. 3d 771, 773 (2008). Nonetheless, as the State concedes, the one-act, one-crime doctrine affects the integrity of the judicial process, and therefore, we are permitted to review defendant's contention pursuant to the plain-error doctrine even though the issue was not raised before the trial court. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010).

We now turn to the merits of defendant's argument. Whether a defendant's multiple convictions violate the one-act, one-crime doctrine is subject to *de novo* review. *People v. Curtis*,

367 Ill. App. 3d 143, 147 (2006). Our supreme court previously explained the one-act, one-crime doctrine, stating:

> "Prejudice results to the defendant only in those instances where more than one offense is carved from the same physical act. Prejudice, with regard to multiple acts, exists only when the defendant is convicted of more than one offense, some of which are, by definition, lesser included offenses. Multiple convictions and concurrent sentences should be permitted in all other cases where a defendant has committed several acts, despite the interrelationship of those acts. 'Act,' when used in this sense, is intended to mean any overt or outward manifestation which will support a different offense. *** [W]hen more than one offense arises from a series of incidental or closely related acts and the offenses are not, by definition, lesser included offenses, convictions with concurrent sentences can be entered." *People v. King*, 66 Ill. 2d 551, 566 (1977).

The one-act, one-crime doctrine requires a two-step analysis. First, the court must determine whether the defendant's conduct involved a single act or multiple acts. Multiple convictions are improper if they are based on precisely the same physical act. *People v. Nunez*, 236 Ill. 2d 488, 494 (2010). However, as long as there are multiple acts as defined in *King*, multiple convictions are permitted even if there is an interrelationship between the acts. *People v. DiPace*, 354 Ill. App. 3d 104, 116 (2004). If a court concludes there are multiple acts, it must then determine whether any of the offenses are a lesser-included offense because if so, multiple convictions are also improper.

Nunez, 236 Ill. 2d at 494. In this case, defendant does not claim that two of his convictions are lesser included offenses, so we are only concerned with the first step.

Since *King*, various cases have defined what constitutes an "act" for the purposes of the one-act, one-crime doctrine. Compare *People v. Miller*, 284 Ill. App. 3d 16, 26 (1996) (five stab wounds in a brief period of time can constitute separate acts and support separate convictions) with *People v. Burrage*, 269 Ill. App. 3d 67, 72 (1994) (firing three guns shots in quick succession were the same act and did not support a conviction of attempted first-degree murder and armed violence). In *People v. Baity*, 125 Ill. App. 3d 50 (1982), the Appellate Court enunciated a six-factor test to determine whether a defendant's conduct constituted a single act (*id.* at 52-53), and applied this test in several subsequent cases (*e.g.*, *People v. Crum*, 183 Ill. App. 3d 473, 490-91 (1989)). Nonetheless, our supreme court, while not addressing the merits of the six-factor test put forth in *Baity*, cautioned that a court "must not lose sight of the forest for the trees" and reiterated that the definition of an "act" remains what the *King* court stated—" 'any overt or outward manifestation which will support a different offense.' " *People v. Rodriguez*, 169 Ill. 2d 183, 188 (1996) (quoting *King*, 66 Ill. 2d at 566); see also *People v. Crespo*, 203 Ill. 2d 335, 342 (2001) ("The definition of an 'act' under the *King* doctrine remains simply what this court stated in *King* ***."). Accordingly, a court must carefully examine the nature of a defendant's conduct as demonstrated by the evidentiary record and then determine whether his or her conduct can be broken down into separate parts, or distinct and identifiable "overt and outward manifestations" that, by themselves, support multiple convictions.

The child pornography statute provides that different types of conduct constitutes the offense

of child pornography. Specifically, section 11—20.1(a)(1)(i) provides that a person commits the offense of child pornography if he or she photographs or otherwise depicts a child under the age of 18 who is engaged in any act of sexual penetration. 720 ILCS 5/11—20.1(a)(1)(i) (West 2008). Section 11—20.1(a)(1)(ii) makes it an offense to photograph or otherwise depict an act of sexual penetration involving the sex organs of a person less than 18 years of age. 720 ILCS 5/11—20.1(a)(1)(ii) (West 2008). Section 11—20.1(a)(4) makes it an offense to photograph or depict a person less than 18 years of age engaged in a lewd touching. 720 ILCS 5/11—20.1(a)(4) (West 2008).

Here, defendant's multiple photographs of the victim engaging in a sexual act constituted separate "acts" pursuant to *King* and its progeny, and therefore, defendant's multiple convictions were proper. The stipulated record contained five pictures of defendant's sexual encounter with the victim. While the pictures are similar because they each depicted defendant's penis penetrating the victim's vagina, each picture nonetheless involved a distinct and identifiable act of defendant photographing the victim while she was engaged in a sexual act. Specifically, one picture shows defendant's penis penetrating the victim's vagina and can constitute a conviction pursuant to section 11—20.1(a)(1)(i). A separate photograph also clearly showed defendant's penis penetrating the victim's vagina from a different angle and can support a conviction pursuant to section 11—20.1(a)(1)(ii). A third photograph again shows defendant's penis penetrating the victim's vagina from a different angle and can support a conviction pursuant to section 11—20.1(a)(4) because such contact fits within the definition of a "lewd touching." See *Lamborn*, 185 Ill. 2d at 595

(holding that photographs depicting the defendant standing completely naked in knee-high water with his arm on a topless victim was "lewd"). Because the photographs were taken independently from one another and depict separate images of defendant penetrating the victim, each photograph can be broken down into a distinct act that is separate from the other photographs. Therefore, each photograph represents a distinct manifestation by defendant to depict the victim while she was engaged in an act of sexual penetration. Thus, contrary to defendant's contentions, his convictions were not based on a singular sexual encounter with the victim, but were rather based on distinct acts of taking multiple photographs to depict that encounter.

We find support for our holding in *People v. Partee*, 157 Ill. App. 3d 231 (1987). In *Partee*, the defendant was convicted of armed robbery and three counts of aggravated battery after assaulting the victim while she was in her car at the Woodfield Shopping Center. *Id.* at 238-41. On appeal, we rejected the defendant's contention that he was improperly convicted and sentenced for three counts of aggravated battery because those counts all arose from one physical act—his assault of the victim. *Id.* at 269. Specifically, we noted that the defendant caused multiple injuries to the victim's neck, face, and ear canal, and "[e]ach injury constituted an independent offense and was caused by a separate physical blow." *Id.* at 270. Therefore, because each blow was separate and distinct, the convictions for multiple counts of aggravated battery were proper. *Id.* Similarly here, each of defendant's photographs constituted an independent injury to the victim, and thus were separate and distinct acts.

Finally, our determination that each photograph of the victim constituted a separate and distinct act is consistent with the spirit and purpose of the child pornography statute. The legislative intent underlying the statute is to prevent the sexual abuse and exploitation of children (*People v. Geever*, 122 Ill. 2d 313, 326 (1988)), and our supreme court noted the child pornography is particularly harmful because the child's actions were reduced to a recording that could harm the victim in future years, particularly in light of the mass distribution system for child pornography. *Lawborn*, 185 Ill. 2d at 589. Although the photographs were taken during the same sexual encounter, each individual photograph could potentially harm the victim in future years, and thus the separate convictions are justified.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the circuit court of Stephenson County.

Affirmed.