IN THE SUPREME COURT OF IOWA
Supreme Court No. 23–0600
Boone County AGCR115533

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JESSE LEE MCCOLLAUGH,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BOONE COUNTY
THE HONORABLE JAMES MALLOY, JUDGE

APPELLEE'S BRIEF

BRENNA BIRD
Attorney General of Iowa

ZACHARY MILLER
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-8894 (fax)
zachary.miller@ag.iowa.gov

MATTHEW SPEERS
Boone County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

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ROUTING STATEMENT

None of the retention criteria in Iowa Rule of Appellate Procedure 6.1101(2) apply to the issues raised in this case, so transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(1).

STATEMENT OF THE CASE

Nature of the Case

The defendant, Jesse Lee McCollaugh, appeals his conviction for sexual exploitation of a minor following a trial on the minutes.

Course of Proceedings

The State accepts the defendant's court of proceedings as adequate and essentially correct. *See* Iowa R. Crim. P. 6.903(3).

Facts

The defendant left his packed bag in the house following a work trip. D0005, Mins. Test. (11/17/2022) at 15; Conf. App. 18. His wife found three cellphones inside while unpacking it. *Id.* In one, she found two videos filmed through a crack in the bathroom curtain of her sister urinating and wiping her vagina. *Id.*; Ex.1. The victim was 15 or 16 and unaware that the defendant filmed her. D0005 at 15; Conf. App. 18. The phone also had a video filmed surreptitiously of the wife's mother changing. *Id.* When the wife confronted the

defendant, he said, "he had a sexual problem" and "admitted to everything." *Id.* at 16.

The wife contacted police. *Id.* at 15–16. The State charged the defendant with one count of sexual exploitation of a minor. D0004, Trial Info. (11/17/2022); App. 4-6. The defendant pled not guilty and elected a trial on the minutes. Tr. Trial, 3:5–5:13. The evidence also included the two videos of the victim. *Id.*; Ex.1.

The district court convicted the defendant. D0022, Verdict (3/3/2023) at 3; App. 20. It determined that the videos showed nudity because "[t]he minor child is seen with her pants removed, using the toilet, with her genitalia exposed." *Id.* It determined that that nudity coupled with the "secret filming" proved that "the visual depiction was made for the purposes of arousing or satisfying the viewer's sexual desires." *Id.*

At sentencing, the State argued "[w]e don't know how often [t]he [defendant] viewed [the videos]. It could have been every day." Tr. Sentencing Hr'g, 4:19–24. It sought a prison sentence; the defendant asked for a suspended sentence. *Id.* at 4:25–5:7, 6:21–7:1.

The district court sentenced the defendant to prison. *Id.* at 12:8–16; D0030, Order (4/11/2023) at 3–4; App. 24-25. He timely appealed. D0034, Notice Appeal (4/12/2023); App. 27.

ARGUMENT

I. The State offered sufficient evidence that the defendant committed sexual exploitation of a minor when he filmed his minor sister-in-law urinating.

Preservation of Error

"[A] defendant need not file a motion for judgment of acquittal to preserve error on a challenge to the sufficiency of the evidence during a bench trial." *State v. Geddes*, No. 22–1009, ___ N.W.2d ___, 2023 WL 8286457, at *3 (Iowa 2023).

Standard of Review

This Court reviews "sufficiency of the evidence for correction of errors at law." *Id.* at *2. It examines "whether, taken in the light most favorable to the State, the finding of guilt is supported by substantial evidence in the record." *Id.*

Merits

The State convicted the defendant of sexual exploitation of a minor for violating Iowa Code sections 728.12(3) and 728.1(7)(g). The defendant argues that the State offered insufficient evidence. Def. Br. at 18. In doing so, he says that section 728.1(7)(g)'s plain language

"requires that [the minor] had to engage in nudity for the purpose of arousing or satisfying the sexual desires of the viewer." *Id.* at 23 (emphasis removed). From there, the defendant says that the victim's purpose was "normally using the toilet," not arousing sexual desires, so the evidence is insufficient. *Id.* at 29–30.

The defendant misinterprets the statute. The law does not require the State to prove the *victim's* purpose in being nude in a visual depiction. The statute's plain language, purpose, Iowa caselaw, and out-of-state caselaw all refute the defendant's argument. The State addresses each in turn before turning to the evidence.

A. The plain language of section 728.1(7)(g) does not require the State to prove the minor's purpose in being nude to prove sexual exploitation of a minor.

The defendant committed sexual exploitation of a minor if he "knowingly … possess[ed] a visual depiction of a minor engaging in a prohibited sexual act …[.]" Iowa Code § 728.12(3). The "prohibited sexual act" here is "[n]udity of a minor for the purpose of arousing or satisfying the sexual desires of a person who may view a visual depiction of the nude minor." Iowa Code § 728.1(7)(g).

Section 728.1(7)(g) does not require the State to prove the minor victim's purpose in being nude. It does not mention the

minor's purpose at all, so the minor's purpose is not an element that the State must prove. Iowa Code § 728.1(7)(g).

The defendant's interpretation both removes words from the statute defining "prohibited sexual act" and fails to consider all the language in the definition. He argues that the victim "had to engage in nudity for the purpose of arousing" a viewer's sexual desires. Def. Br. at 23. That removes "of a minor" from "[n]udity" in section 728.1(7)(g). But section 728.1(7)(g) makes *"[n]udity of a minor* for the purpose of arousing or satisfying the sexual desires of a person who may view a visual depiction of the nude minor" a prohibited sexual act. Iowa Code § 728.1(7)(g) (emphasis added). In other words, it is the purpose of the "[n]udity of a minor" in the visual depiction that matters. Indeed, the statute links the "[n]udity of the minor" to the viewer of the visual depiction of the "nude minor," confirming that the "nudity of the minor" must be "for the purpose of" sexually arousing or gratifying a person who views the nude minor. Thus, the relevant purpose that the State must prove is the purpose of the nudity of the minor in the visual depiction, not the minor's purpose in being nude.

The defendant's argument also seems to rely on the "minor engaging in" language from section 728.12(3). But that section does not discuss the minor's purpose in doing anything. Rather, it requires the minor to be "engaging in" prohibited sexual activity. Iowa Code § 728.12(3). That a minor must be engaging in prohibited sexual activity imposes no requirement that the State prove why the minor is so engaging.

The plain language of sections 728.1(7)(g) and 728.12(3) does not require the State to prove that a minor victim's purpose in being nude is to arouse a viewer's sexual desires. Instead, the "[n]udity of a minor" in the visual depiction must be for the purpose of arousing a viewer. Iowa Code § 728.1(7)(g).

B. The defendant's interpretation of the sexual exploitation statute undermines the statute's purpose by dramatically reducing its coverage.

Section 728.12(3) "prohibits the purchase and possession of child pornography." *State v. Robinson*, 618 N.W.2d 306, 313 (Iowa 2000). "Child pornography … is regulated because its mere creation is harmful to children in that it exploits children in undesirable and perverse ways." *Id.* at 316; *New York v. Ferber*, 458 U.S. 747, 758 (1982). That is why creating it, disseminating it, or possessing it is

illegal; such material is "contraband." *Robinson*, 618 N.W.2d at 316. Plus, criminalizing child pornography curtails the market for such materials. *Ferber*, 458 U.S. at 759–62.

The defendant's interpretation of the child pornography statute is contrary to its purpose of reducing exploitation of children. Focusing on the minor's purpose in being nude when captured in a visual depiction would render many types of child pornography non-criminal. For example, sexualized images of a nude baby—say wearing only stockings and posed like *The Graduate* film poster—would no longer qualify. That is because the baby has no purpose in being nude, much less a purpose to arouse or gratify a viewer's sexual desires. Another example, a visual depiction of a 10-year-old child naked in a sexualized pose is not child pornography under the defendant's construction if the child complied with the child pornographer's commands for fear of retribution for refusing rather than to arouse a viewer.

This Court should decline to adopt the defendant's construction of the sexual exploitation statute because it conflicts with the statute's purpose of preventing exploitation by removing hallmark child pornography from its purview.

C. Iowa cases reviewing convictions under section 728.1(7)(g) have never required the State to prove the victim's purpose in being nude.

No Iowa case interpreting or applying Iowa Code section 728.1(7)(g) has held that proving a minor's purpose for being nude is an element of sexual exploitation of a minor. Cases have, however, suggested that the law criminalizes possessing photos or videos of nude minors recorded surreptitiously.

In *State v. Rees*, the Iowa Court of Appeals affirmed the defendant's sexual-exploitation-of-a-minor conviction when the defendant photographed a minor while she pulled down provocative clothing and surreptitiously filmed her changing in a bathroom. No. 14–1124, 2015 WL 3876740, at *1, *3 (Iowa Ct. App. June 24, 2015). The Iowa Court of Appeals rejected the defendant's argument that "there was insufficient evidence that his activities were intended to satisfy, arouse, or gratify sexual desires," in part because no "other explanation for having a video camera in the bathroom where [the victim] was dressing was given." *Id.* at *3. Notably, the court accepted that sufficiency review focused on whether the defendant's activities were to arouse or gratify his sexual desires. *Id.* It never discussed the victim's purpose in being nude. *See generally id.*

In *State v. Hunter*, the Iowa Supreme Court rejected a vagueness challenge to section 728.1(7)(g). 550 N.W.2d 460, 462 (Iowa 1996) *overruled on other grounds*.[1] It concluded that "for the purpose of arousing or satisfying the sexual desires" is clear enough to withstand a vagueness challenge. *Id.* at 465–66. It explained that "nudity of a minor" should be read with "for the purpose of arousing or satisfying … sexual desires" to require more than mere nudity of a minor in a photograph before possessing the photograph is illegal. *Id.* at 466. And it said that, as applied, the defendant "can hardly claim one in his position would think his conduct innocent when he took the photographs late at night, in a motel room, dressed only in his underwear and with an erection." *Id.* The Court never considered the victim's purpose in being nude. *See generally id.*

In *State v. Anderson*, the Iowa Court of Appeals affirmed a defendant's conviction of sexual exploitation of a minor for possessing a brochure "containing several photographs of semi-nude children on a beach. The brochure advertised the sale of DVDs that included footage of naked or topless girls." No. 10–0787, 2011 WL 1376731, at *1, *3 (Iowa Ct. App. Apr. 13, 2011). The court held that a

[1] At that time, the relevant code provision was section 728.1(6)(g).

jury could find that the nude photos of children in the brochure were to arouse a viewer's sexual desires, especially when coupled with the written context in the brochure, so the evidence sufficed. *Id.* at *2. The court never considered the victims' purpose in being nude. *See generally id.*

Together, the cases teach that a victim's purpose in being nude is not an element of sexual exploitation of a minor under section 728.1(7)(g). They undermine the defendant's argument.

D. Cases from outside Iowa do not support the defendant's argument that the victim's purpose in being nude is an element of sexual exploitation of a minor.

The defendant cites three out-of-state cases that hold visual depictions of nude minors obtained surreptitiously do not violate child pornography statutes when they show "nudity alone." Def. Br. at 27–28 (citing *State v. Whited*, 506 S.W.3d 416 (Tenn. 2016); *State v. Gates*, 897 P.2d 1345 (Ariz. Ct. App. 1994) *superseded by statute as stated in State v. Chandler*, 418 P.3d 1109, 1111 (Ariz. Ct. App. 2017); *Lockwood v. State*, 588 So. 2d 57 (Fla. Dist. Ct. App. 1991) (per curiam)). But those cases are of limited value because the statutes that they interpreted differ from Iowa's sexual exploitation law.

The three statutes applied in those cases prohibited lewd or lascivious exhibition of the female breasts or the genitals, buttocks, anus, pubic, or rectal area of any person. *Whited*, 506 S.W.3d at 428 (quoting Tenn. Code Ann. § 39–17–1002(8)(G)); *Gates*, 897 P.2d at 1348 (quoting A.R.S. § 13–3551(2)(f)); *Lockwood*, 588 So. 2d at 58 (quoting Fla. Stat. § 827.071(1)(g)). Each state defined lewd or lascivious as "tending to excite lust; lewd; indecent; obscene," or sexual conduct but excluding mere nudity. *Whited*, 506 S.W.3d at 430–31; *Gates*, 897 P.2d at 1348–49; *Lockwood*, 588 So. 2d at 58. Thus, they required that the exhibition of the child's genitals must itself be lascivious, meaning lustful, sexual, or obscene.

Iowa's sexual exploitation statute is different. It requires "[n]udity of a minor for the purpose of arousing or satisfying the sexual desires of a person who may view a visual depiction of the nude minor." Iowa Code § 728.1(7)(g). Thus, Iowa's law does not require that the nudity of the minor itself be lascivious, obscene, or overtly sexual. Indeed, it does not use the words lewd, lascivious, or exhibition. *Id.*

In any event, many decisions applying similar child pornography statutes to those applied in *Whited*, *Gates*, and

Lockwood reach the opposite conclusion. They conclude that surreptitiously filming a nude minor engaged in normal, everyday activity is lascivious exhibition. *Whited*, 506 S.W.3d at 443–45 (collecting cases).

Moreover, courts reviewing child pornography statutes with language similar to Iowa Code section 728.1(7)(g) have interpreted those statutes to require that the purpose of the nudity of a minor in the depiction must be to sexually arouse. *Commonwealth v. Davidson*, 938 A.2d 198, 212–13 (Pa. 2007) (noting the similarity between Pennsylvania's and Iowa's child pornography laws and interpreting Pennsylvania's law to require that "nudity in the image is depicted for sexual stimulation or gratification"); *State v. Morrison*, 31 P.3d 547, 550–52 (Utah 2001) (holding that Utah's statute that criminalizes knowingly possessing "material … depicting a nude or partially nude minor for the purpose of causing sexual arousal of any person" meant the nudity in the depiction must be to cause sexual arousal) (quoting Utah Code Ann. § 76–5a–3(1))). A Pennsylvania appeals court has affirmed a child pornography conviction under its law, similar to Iowa's, when a man surreptitiously filmed minors changing at a public beach. *Commonwealth v. Savich*, 716 A.2d 1251,

1253, 1255–57 (Pa. Super. Ct. 1998); *see also People v. Campa*, No. H037135, 2012 WL 4127442, at *1–3 (Cal. Ct. App. Sept. 20, 2012) (affirming child pornography conviction that required "exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer" when defendant surreptitiously filmed 16-year-old in bathroom (quoting Cal. Pen. Code § 311.4(d))). This Court should reach the same result.

Out-of-state decisions, therefore, support affirming the defendant's conviction, not adopting his argument.

E. The State offered sufficient evidence that the defendant committed sexual exploitation of a minor when he filmed his minor sister-in-law urinating and wiping her vagina.

The State offered sufficient evidence to convict the defendant. The minutes proved that he knew the videos of his sister-in-law using the toilet were on his phone; indeed, he admitted filming them. D0005 at 15–16; Conf. App. 18-19.

The State also offered sufficient evidence that the videos showed "[n]udity of a minor for the purpose of arousing or satisfying the sexual desires of a person who may view a visual depiction of the nude minor." Iowa Code § 728.1(7)(g). The videos show the victim's pubic area as she urinates and stands to wipe. Ex.1. The defendant

filmed them through a crack in the bathroom curtain. *Id.* The defendant also recorded his mother-in-law changing. D0005 at 15; Conf. App. 18. Voyeurism is a common sexual fetish. The defendant acknowledged that he had a "sexual problem" and "admitted everything." *Id.* at 15, 16; Conf. App. 18-19; *State v. Jordan*, 493 P.3d 683, 685 (Utah 2021) (holding that "a factfinder may consider extrinsic evidence of the sexual purpose of a person charged with producing a visual depiction of nudity—the purpose inquiry is not limited to the four corners of the image itself"); *Anderson*, 2011 WL 1376731 at *2 (stating fact finder could consider context around pictures in assessing whether purpose was to arouse a viewer's sexual desires). He offered no innocent explanation for the videos. *See generally* D0005; Conf. App. 4-36, *cf. Rees*, 2015 WL 3876740, at *3 (noting that the defendant offered "[n]o other explanation for having a video camera in the bathroom where" the minor changed). And they were among other pornography found on his phone. D0005 at 15; Conf. App. 18. Together that evidence was sufficient to prove the defendant's sexual purpose in filming his minor sister-in-law nude in the bathroom.

The State offered sufficient evidence; this Court should affirm his conviction.

II. The district court did not consider unproven conduct when it sentenced the defendant to prison.

Preservation of Error

The defendant can raise his sentencing challenge for the first time on appeal. *State v. Shearon*, 660 N.W.2d 52, 57 (Iowa 2003).

Standard of Review

This Court reviews sentencing decisions for correction of errors at law. *State v. Letscher*, 888 N.W.2d 880, 883 (Iowa 2016). It "will not reverse the decision of the district court absent an abuse of discretion or some defect in the sentencing procedure." *Id.* A sentence within statutory limits, like the defendant's, receives a "strong presumption in its favor." *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002).

Merits

The district court explained why it sentenced the defendant to prison:

> The purpose of any sentence is to provide both for your rehabilitation and the protection of the public. In deciding what type of sentence to impose, the Court looks at a number of factors. Your age; you're a 43-year-old man. You're working; you have a job at this point in time.

> You are not married. You've got children who you are responsible to help support.
>
> We look at your prior criminal history. We look at the nature of the offense. I've had an opportunity, as you have, to review your presentence investigation report. The nature of the offense is one that, thankfully, we don't see a lot of. This is not like it's a drunk driving offense. Sexual exploitation of a minor; and as was indicated, the actual video was taken a number of years ago. You were found guilty at a trial to the Court. So I've been able to review that and the circumstances surrounding it.
>
> …
>
> Based on all of the things we've talked about here, the nature of the offense, your age, and the other circumstances mentioned both within your PSI and that we've talked about today, I am going to impose an indeterminate term not to exceed two years in the custody of the director of the Department of Corrections.

Tr. Sentencing Hr'g, 8:22–12:13; *see also* D0030 at 4; App. 25. That explanation included the statutory goals of rehabilitation and protecting the community and relied on statutorily approved factors. Tr. Sentencing Hr'g, 8:22–12:13; D0030 at 4; App. 25; Iowa Code §§ 901.5, 907.5. It passed muster.

The defendant disagrees. He said that the State presented unproven facts when it argued that "we don't know how often [the defendant viewed the videos]. It could have been every day." Def. Br.

at 32 (quoting Tr. Sentencing Hr'g, 4:4–24). He says that the district court considered that unproven fact by saying that "it considered 'all of the things we've talked about'" before imposing sentence because one of those things was the "unproven fact" mentioned by the State. *Id.* at 30, 32, 36 (typography altered) (quoting Tr. Sentencing Hr'g, 12:8–13).

His argument ignores context. The district court mentioned "all of the things we've talked about here" after explaining many facets of its sentencing decision. Tr. Sentencing Hr'g, 8:22–12:16. It then reiterated some of those things. *Id.* at 12:8–13. None was how often the defendant viewed the videos. *See generally id.*; *see also* D0030 at 4; App. 25. He failed to prove that the district court considered unproven facts.

Because the district court properly exercised its sentencing discretion, this Court should affirm the defendant's sentence.

CONCLUSION

For the foregoing reasons, the State requests that this Court affirm the defendant's conviction and sentence.

REQUEST FOR NONORAL SUBMISSION

This case is appropriate for nonoral submission.

Respectfully submitted,

BRENNA BIRD
Attorney General of Iowa

ZACHARY MILLER
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
zachary.miller@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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ZACHARY MILLER
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
zachary.miller@ag.iowa.gov