2018 IL App (4th) 160015-U

NO. 4-16-0015

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
August 30, 2018
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
GERALD W. LONG,	)	No. 13CF236
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas E. Little,
	)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Knecht and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying defendant's motion to suppress evidence. The photographs at issue were "lewd" and constituted child pornography. The court did not err in instructing the jury as to the offense of child pornography.

¶ 2 A jury found defendant, Gerald W. Long, guilty of two counts of child pornography (720 ILCS 5/11-20.1 (a)(1) (West 2012)). Prior to trial, defendant filed a motion to suppress evidence, arguing a cell phone containing child pornography was seized during an improper investigatory stop. The trial court denied defendant's motion. Defendant was sentenced to two consecutive terms of 25 years in prison. Defendant appeals, arguing that (1) the court erred in denying his motion to suppress evidence; (2) exhibits 13 and 14 did not constitute child pornography; and (3) the jury was not instructed on the proper factors to consider in determining whether exhibits 13 and 14 were "lewd" and thus defendant was denied his right to a fair trial.

We affirm.

¶ 3 I. BACKGROUND

¶ 4 In February 2013, the State charged defendant with multiple counts of child pornography (720 ILCS 5/11-20.1 (a)(1), (a)(6) (West 2012)) (counts I-IV). The State amended the charges, alleging that defendant committed the offense of child pornography by knowingly photographing the breast of a minor child, L.H. (born May 24, 2002) (720 ILCS 5/11-20.1 (a)(1) (West 2012)) (counts I and V).

¶ 5 In March 2015, the trial court conducted a hearing on defendant's motion to suppress evidence. Defendant first presented the testimony of Detective Doug Allen. Allen testified that, on February 19, 2013, officers executed a search warrant issued earlier that same day for a residence located at 266 Lisa Drive in Decatur, Illinois. The search warrant authorized officers to seize "computer media" pertaining to "child pornography" from 266 Lisa Drive. The search warrant did not make any reference to defendant.

¶ 6 Detective Ronald Borowczyk testified that he specialized in investigating cyber crime. In July 2012, he discovered that child pornography was being uploaded to an IP address that was later associated with the residence at 266 Lisa Drive. Detective Borowczyk acknowledged he was unable to identify the individual who was uploading the child pornography. However, he was able to identify multiple dates when child pornography was in fact downloaded from electronic devices at 266 Lisa Drive.

¶ 7 Detective Borowczyk testified he prepared the application for the search warrant in this case. When the search warrant was executed in February 2013, officers seized a desktop computer, six laptops, eight hard drives, and several computers that were in the process of being

built. Detective Borowczyk stated he "found items on one of the laptop computers that [was] know[n] [to] be used by the defendant[,] *** [which] indicated that images [of] *** child pornography were on the laptop[.] *** The EXIF data [on the laptop] led us back to the LG cell phone." Detective Borowczyk explained that EXIF data "refer[s] to what we would call a source device or the device used to create the image." He further testified "[t]he EXIF data *** showed that the images were created using [an] LG device." When the forensic examination of the computers revealed that the images were created by a LG cellular device, Detective Borowczyk proceeded to examine the SD card located within a LG cell phone that had been inventoried following the execution of the search warrant. He stated he could not search the LG cell phone because it was locked, but he was able to remove its SD card. He stated his belief that the SD card was covered by the search warrant because it qualified as "magnetic storage media," which was a term used in the warrant. He testified the SD card contained what he believed to be images of child pornography created by defendant.

¶ 8 Defendant testified on his own behalf at the suppression hearing. He stated he was not at 266 Lisa Drive when the officers initially began searching the residence. Defendant testified he was stopped by Lieutenant Samuel Walker while waiting to turn left at Greenswitch Road "right before the train tracks meeting at *** Route 48." He stated Lieutenant Walker verified his identity and radioed back to the officers at 266 Lisa Drive. Lieutenant Walker then told him to return to 266 Lisa Drive. At that point, according to defendant, Lieutenant Walker noticed a cell phone in the vehicle. Defendant stated Lieutenant Walker asked him to "hand over the phone." Lieutenant Walker assured defendant that he would return the phone once defendant returned to the residence. Defendant testified that, during the traffic stop, his mother called the

cell phone. He further testified that, when Lieutenant Walker asked him for the phone, he "figured why not" and he gave it to Lieutenant Walker. Defendant stated the phone did not belong to him and, as far as he knew, "nothing bad [was] on there."

¶ 9 The State presented the testimony of Lieutenant Walker. Lieutenant Walker testified that, on February 19, 2013, he was driving to 266 Lisa Drive to search the residence when he observed defendant in his vehicle. He described the traffic stop of defendant as follows:

> "As I was approaching[,] information was broadcasted regarding the target of the search warrant, [defendant], leaving the trailer park. *** At that point I turned around[,] and as the vehicle passed[,] I observed the vehicle that was described over the radio[,] [and] the subject *** driving the vehicle *** match[ed] a photo during an earlier briefing [about] the search warrant[.] *** [T]hen I conducted an investigative stop o[f] the vehicle.
>
> * * *
>
> As I approached the vehicle[,] my original purpose was to inform [defendant] that members of the Decatur Police Department were going to be conducting a search *** at his residence. As I approached [defendant] to inform him of this, I also was attempting to determine if there [were] any weapons or anything of that nature in the vehicle, just through observation[,] because we had information that [defendant] may have weapons in his residence."

¶ 10 Lieutenant Walker further testified that, in addition to his concerns regarding defendant's possible possession of weapons, he also "wanted to ensure [defendant] was not removing any evidence [identified in] the search warrant." He testified he offered defendant an

opportunity to return to his residence, and defendant indicated he would because he had his sister's laptop and he wanted to return it to her.

¶ 11 Lieutenant Walker further testified that, during the encounter, defendant attempted to make phone calls from a cell phone. According to Lieutenant Walker, defendant said it belonged to his mother and he was "en route to take the phone for some service [because] he was having some issues with the phone." Lieutenant Walker asked if defendant would voluntarily turn the cell phone over to him, and defendant voiced no objection. Lieutenant Walker denied telling defendant the phone would be returned.

¶ 12 The trial court denied defendant's motion to suppress the evidence found on defendant's cell phone. The court stated, in pertinent part, as follows:

> "Apparently the [d]efendant was a target of the investigation even though he was not specifically named in the warrant. [Lieutenant] Walker [was] assisting in the execution of the search warrant. *** [Lieutenant] Walker *** testified that he temporarily stopped or detained the [d]efendant as he was leaving the residence. And this [c]ourt believes that [Lieutenant] Walker had a right to do so in conjunction with the execution of the search warrant.
>
> * * *
>
> I don't [agree with] the State's argument that the cell phone and/or [SD] card is actually contained within the 4 corners of the warrant [as] some type of magnetic equipment, but I do believe *** a warrant for the cell phone could have been inevitably obtained. Detective Borowczyk testified that he examined the laptop. In examining the laptop he saw the image which *** he could have traced back to

> the cell phone. Detective Borowczyk could and would have obtained a search warrant for the cell phone and the [SD] card within the cell phone at that time.*** I find that the [State] ha[s] proven inevitable discovery by a preponderance of the evidence. So it is on that basis that the [d]efendant's motion is denied."

¶ 13 In August 2015, the case proceeded to trial. The State presented evidence of photos and videos allegedly containing child pornography that the State claimed defendant created and possessed. Detective Borowczyk testified that, with respect to State's exhibits 7 through 14, the images depicted were ultimately discovered on defendant's Acer laptop. Those images depicted a child, L.H., reclining on a bed with her stepsister, H.J. Exhibits 13 and 14 showed an adult's hand pulling L.H.'s nightgown down to reveal her breast.

¶ 14 Detective Borowczyk further testified that the Acer laptop with images of child pornography was discovered in defendant's bedroom. He stated that, with respect to exhibits 13 and 14, he was able to see the EXIF data. He explained "EXIF" stands for "exchangeable image format." The EXIF data showed the time when the photos depicted in exhibits 13 and 14 were created and the device that created them. He testified the LG cell phone created the images.

¶ 15 L.H.'s father testified L.H. was born on May 24, 2002. He explained defendant was a friend of his stepson, and defendant would visit their residence to assist with yard work and other projects around the home. He identified defendant in court.

¶ 16 L.H. testified she knew defendant as a friend of her stepbrother. She testified defendant would occasionally watch movies in her bedroom. When L.H. was shown exhibits 13 and 14, she identified herself and explained the photos were taken without her permission or knowledge. L.H. confirmed the hand in the photos pulling down her nightgown was not hers.

¶ 17 Deborah Dunn, defendant's mother, testified on defendant's behalf. Dunn stated that she rented the Acer laptop for defendant's use. She explained the LG phone belonged to her but defendant also used it. She testified that she had observed several of defendant's friends use both the LG cell phone and the laptop. Dunn denied taking the photos in exhibits 7-14.

¶ 18 Following deliberations, the jury found defendant guilty of two counts of child pornography. Defendant was sentenced to two consecutive terms of 25 years in prison.

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 Defendant argues on appeal that (1) the trial court erred in denying his motion to suppress evidence; (2) exhibits 13 and 14 did not constitute child pornography; and (3) the jury was not instructed on the proper factors to consider in determining whether exhibits 13 and 14 were "lewd" and thus defendant was denied his right to a fair trial.

¶ 22 A. Suppression of the Evidence

¶ 23 As stated, defendant argues the trial court erred in denying his motion to suppress evidence. There is a two-part standard of review that applies when considering a trial court's ruling on a motion to suppress evidence. *People v. Timmsen*, 2016 IL 118181, ¶ 11, 50 N.E.3d 1092. First, the court's factual findings will be upheld unless they are against the manifest weight of the evidence. *Id.* A finding of fact is against the manifest weight of the evidence where an opposite conclusion is clearly evident. *People v. Miles*, 343 Ill. App. 3d 1026, 1030, 798 N.E.2d 1279, 1283 (2003). Second, the court's legal conclusion regarding whether suppression is warranted is reviewed *de novo*. *Timmsen*, 2016 IL 118181, ¶ 11.

¶ 24 The fourth amendment to the United States Constitution and article I, section 6, of

the Illinois Constitution protect citizens against unreasonable searches and seizures. *Id.* ¶ 9 (citing U.S. Const. amend. IV; Ill. Const. 1970, art. I, § 6). "The touchstone of the fourth amendment is 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' " *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)). The search-and-seizure provision of the Illinois Constitution is interpreted in the same manner as the fourth amendment. *People v. Caballes*, 221 Ill. 2d 282, 290, 851 N.E.2d 26, 32 (2006).

¶ 25 "To enforce the Fourth Amendment's prohibition against 'unreasonable searches and seizures,' *** at times [courts] *** exclude evidence obtained by unconstitutional police conduct." *Utah v. Strieff*, ___ U.S. ___, 136 S. Ct. 2056, 2059 (2016). However, "[w]ithin the framework of these fundamental rules there is some latitude for police to detain where 'the intrusion on the citizen's privacy 'was so much less severe' *** that *** 'the opposing interests in crime prevention and detection and in the police officer's safety' could support the seizure as reasonable." *Bailey v. United States*, 568 U.S. 186, 193 (2013) (quoting *Michigan v. Summers* 452 U.S. 692, 697-698 (1981)).

¶ 26 1. *Search Incident to the Execution of a Warrant*

¶ 27 Here, the trial court determined Lieutenant Walker lawfully stopped defendant in his vehicle "in conjunction" with the execution of the search warrant. Defendant argues on appeal that his detention was not reasonable, the search warrant did not authorize police to detain him in his vehicle "one mile" away from his residence, and thus the LG cell phone that was subsequently seized as a result of that improper detention must be suppressed.

¶ 28 In support of his argument, defendant relies on *Bailey v. United States*, 568 U.S. 186 (2013). In *Bailey*, police obtained a search warrant for a residence. *Id.* at 190. During the

surveillance of the premises, two people left the residence and detectives stopped their vehicle approximately one mile away. *Id.* In determining whether the stop was reasonable under the fourth amendment, the United States Supreme Court recognized that, although officers are justified in detaining occupants of the residence incident to the execution of a search warrant under *Michigan v. Summers*, 452 U.S. 692 (1981), the detention is more "intrusive" when the person is detained some distance away from the premises to be searched. *Bailey*, 568 U.S. at 200. Accordingly, *Bailey* instructs that the permissibility of detaining occupants incident to the execution of a search warrant is spatially constrained to the "immediate vicinity" of the premises to be searched. *Id.* at 201. "Once an individual has left the immediate vicinity of a premises to be searched, *** detentions must be justified by some other rationale." *Id.* at 202.

¶ 29 In this case, defendant, his vehicle, and the LG cell phone were not particularly described in the search warrant. *Groh v. Ramirez*, 540 U.S. 551, 557 (2004) (The fourth amendment requires that a warrant "particularly" describe the "place to be searched, and the persons or things to be seized ***.") (Emphasis omitted.) Defendant had left 266 Lisa Drive before the search warrant was executed, and Lieutenant Walker detained him some distance from the premises. There is no evidence in the record to support an inference that defendant was within the "immediate vicinity" of the premises to be searched. *Bailey*, 568 U.S. at 200. To the contrary, defendant testified at the suppression hearing regarding his route of travel as he drove away from the residence. He testified he had left the trailer park and was pulled over by Lieutenant Walker on Greenswitch Road "right before the train tracks meeting at *** Route 48." We find it unnecessary to address defendant's request that we take judicial notice of the Google map reference in the appendix of his brief. Defendant's uncontradicted description of his route of

travel makes clear he was not in the "immediate vicinity" of his residence when he was stopped by Lieutenant Walker. We find that, under *Bailey*, defendant was not within the "immediate vicinity" of the premises to be searched under the warrant, and thus he could not be detained incident to the execution of the search warrant. *Id.*

¶ 30 2. *Terry Stop*

¶ 31 Defendant argues that his detention was not based on a reasonable, articulable suspicion in accordance with *Terry v. Ohio*, 392 U.S. 1 (1968). Defendant contends that his detention was in violation of the fourth amendment, and thus his alleged consent to the seizure of the cell phone was tainted by the improper detention.

¶ 32 A traffic stop "constitutes a 'seizure' *** within the meaning of the fourth amendment" and is "subject to the fourth amendment's reasonableness requirement." *People v. Close*, 238 Ill. 2d 497, 504–05, 939, N.E.2d 463, 467 (2010). In *Terry v. Ohio*, 392 U.S. 1, 30 (1968), the United States Supreme Court recognized a limited exception to the warrant requirement, holding that a police officer may conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion "that criminal activity may be afoot ***." To determine whether the officer acted reasonably, "due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.* at 27.

¶ 33 Further, "[t]he investigatory stop must be justified at its inception." *Close*, 238 Ill. 2d at 505. We use an objective standard to evaluate a police officer's conduct and consider "whether the facts available to the officer warrant a person of reasonable caution to believe that the action which the officer took was appropriate." *People v. Houlihan*, 167 Ill. App. 3d 638,

642, 521 N.E.2d 277, 280 (1988). "If reasonable suspicion is lacking, the traffic stop is unconstitutional and evidence obtained as a result of the stop is generally inadmissible." *People v. Gaytan*, 2015 IL 116223, ¶ 20, 32 N.E.3d 641.

¶ 34 We need not reach defendant's contentions regarding the investigatory stop and his subsequent consent to the seizure of the cell phone because, as discussed below, we conclude the information from the cell phone was otherwise admissible under the inevitable discovery doctrine.

¶ 35 3. *Inevitable Discovery*

¶ 36 The State argues the evidence from the LG cell phone was admissible because it would inevitably have been discovered during the valid execution of the search warrant at 266 Lisa Drive. We agree.

¶ 37 The doctrine of inevitable discovery "allows for the admission of evidence that would have been discovered even without the unconstitutional source." *Utah v. Strieff*, ___ U.S. ___, 136 S. Ct. 2056, 2061 (2016). It permits evidence that would otherwise be inadmissible "where the State can show that such evidence would inevitably have been discovered without reference to the police error or misconduct." (Internal citations and quotations omitted.) *People v. Sutherland*, 223 Ill. 2d 187, 228, 860 N.E.2d 178, 209 (2006). If the State "can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means *** [then] the evidence should be received." (Emphasis omitted.) *People v. Durgan*, 281 Ill. App. 3d 863, 867, 667 N.E.2d 730, 733 (1996) (citing *Nix v. Williams*, 467 U.S. 431, 444 (1984)). "Circumstances justifying application of the 'inevitable discovery' rule are most likely to be present if *** investigative procedures were already in progress prior to

the discovery via illegal means." *People v. Mitchell*, 189 Ill. 2d 312, 342, 727 N.E.2d 254, 272 (2000) (citing 5 W. LaFave, Search & Seizure § 11.4(a), at 249 (3d ed.1996)).

¶ 38 Generally, courts allow evidence under the inevitable discovery doctrine where (1) the condition of the evidence would have been the same as that when improperly obtained; (2) the evidence would have been found by an independent line of investigation untainted by the illegal conduct; and (3) the independent line of investigation must have already been in progress at the time the evidence was unconstitutionally obtained. *People v. Alvarado*, 268 Ill. App. 3d 459, 470, 644 N.E.2d 783, 791 (1994). "[I]nevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment." *Nix*, 467 U.S. at 445 n.5.

¶ 39 Here, the trial court found the evidence from the LG cell phone was admissible under the inevitable discovery doctrine. At the motion to suppress hearing, Detective Borowczyk testified that, during the execution of the search warrant at 266 Lisa Drive, he "found items on one of the laptop computers that [was] know[n] [to] be used by the defendant[,] *** [which] indicated that images [of] *** child pornography were on the laptop[.] *** The EXIF data [on the laptop] led us back to the LG cell phone." Detective Borowczyk further testified EXIF data "refer[s] to what we would call a source device or the device used to create the image." He stated "[t]he EXIF data *** showed that the images were created using [an] LG device." The testimony at the suppression hearing revealed that an independent investigation was already in progress. The steps taken by Detective Borowczyk led to the discovery of the EXIF data on defendant's laptop, which was lawfully seized pursuant to the execution of the search warrant. Thus, the EXIF data on the laptop would inevitably have led to the discovery of the images on the cell

phone.

¶ 40 Defendant contends that because he was taking the cell phone to be "serviced" when he was detained by Lieutenant Walker, the phone's components could have been "misplaced," and thus the State did not prove the condition of the evidence would have been the same without Lieutenant Walker's seizure of the cell phone during the allegedly illegal investigatory stop. We find defendant's argument is speculative. At the suppression hearing, Lieutenant Walker testified that, when he detained defendant, defendant stated he was "en route to take the phone for some service ***." Based on this limited testimony, we cannot conclude the condition of the evidence would have been altered simply because defendant allegedly was taking the phone for "some" service. Instead, we find the evidence from the cell phone would have been discovered through an independent line of investigation being conducted by Detective Borowczyk as discussed above. Accordingly, we find the trial court did not err in denying defendant's motion to suppress the evidence because the information from the cell phone was otherwise admissible under the inevitable discovery doctrine.

¶ 41 B. Exhibits 13 and 14

¶ 42 Defendant argues exhibits 13 and 14 were not "lewd" and thus do not qualify as child pornography. We disagree.

¶ 43 On review, we must determine whether the photos were "lewd under the child pornography statute." *People v. Lamborn*, 185 Ill. 2d 585, 590, 708 N.E.2d 350, 354 (1999). "Lewdness must be construed in light of the grave concerns regarding the sexual exploitation of children and the attendant harm it causes the children involved in child pornography." *People v. Lewis*, 305 Ill. App. 3d 665, 677, 712 N.E.2d 401, 410 (1999). Courts must apply an objective

standard of review and focus on the photos themselves, not the circumstances surrounding the taking of the photos. *Lamborn*, 185 Ill. 2d at 597. The determination of whether a photo was "lewd" is made on a case-by-case basis. *Id.* at 593. This involves a question of statutory construction, which we review *de novo. Id.* at 590.

¶ 44 Under section 11-20.1(a)(1)(vii) of the Criminal Code of 1961, a person commits the offense of child pornography when he:

> "films, videotapes, photographs, or otherwise depicts or 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 18 *** 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 or other person[.]" 720 ILCS 5/11-20.1 (a)(1)(vii) (West 2012).

¶ 45 In *People v. Lamborn*, 185 Ill. 2d 585, 708 N.E.2d 350 (1999), our supreme court noted "lewd" has been defined as " '[o]bscene, lustful, indecent, lascivious, [or] lecherous.' " *Lamborn*, 185 Ill.2d at 591 (quoting *People v. Walcher*, 162 Ill. App. 3d 455, 460, 515 N.E.2d 319, 323 (1987)). The *Lamborn* court set forth the following six-factor test to determine whether an image qualifies as lewd:

> "(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.

A photo need not possess all of these characteristics to be considered lewd. *Id.* "Rather, 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." *Id.* at 592-593.

¶ 46 Here, the two photos at issue—exhibits 13 and 14—depict a child, L.H., who was under the age of 13 at the time the photos were taken. In both photos, the focal point is the child's exposed breast and an adult hand can be seen pulling down her nightgown. The primary difference between the two photos is that the child's face is seen in exhibit 13 but it is not seen in exhibit 14.

¶ 47 Defendant concedes the first factor—regarding the "focal point" of the photos—supports a finding of "lewdness" because the focal point is L.H's partially exposed breast. *Id.* at 592.

¶ 48 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." *Id.* Although the photos were taken in a bedroom, we find the setting is not necessarily sexually suggestive. See *Lewis*, 305 Ill. App. 3d at 678 ("[A]lthough the setting is a bedroom, this fact is not used to suggest sexual activity."). Here, the setting of L.H.'s bedroom is barely visible in the photos at issue. L.H. testified that she did not know the photos were being taken. Indeed, in both photos, she does not appear to be interacting with the camera whatsoever. There is no evidence to

suggest that L.H. was posing. Accordingly, this factor does not weigh in favor of a finding of lewdness.

¶ 49 The third factor concerns "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. The photos here depict an adult hand pulling down the neckline of L.H.'s nightgown to partially expose her breast. Certainly, this cannot be construed as a natural pose especially in light of L.H.'s age. This factor supports a finding of lewdness.

¶ 50 The fourth factor concerns "whether the child is fully or partially clothed, or nude." *Id.* at 592. Defendant concedes that L.H. is partially nude, which supports a finding of lewdness.

¶ 51 The fifth factor is "whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity." *Id.* at 592. In both photos, it *appears* L.H. is not resisting efforts to expose her breast. It is with caution that we use the word "appears." It may be that the photos were taken at the same time the hand shown in the photo pulled down the nightgown, giving L.H. no time to react prior to the photos being taken. In any event, the appearance of acquiescence might lend itself to the suggestion of willingness to engage in sexual activity notwithstanding that it may well have been a false appearance. We find this factor weighs in favor of lewdness.

¶ 52 The sixth factor is "whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Id.* at 592. In *People v. Sven*, 365 Ill. App. 3d 226, 238, 848 N.E.2d 228, 239 (2006), the Second District explained that the proper inquiry for this factor "focuses upon whether the image invites the viewer to perceive the image from some sexualized

or deviant point of view." The court further noted that, "by placing the viewer in the role of voyeur, the images become sexualized." *Id.* at 240. Defendant concedes L.H. was not aware the photos were being taken and they invited the viewer to perceive her from an outside perspective. We find the photos place the viewer in the role of a voyeur, thus this factor weighs in favor of a finding of lewdness.

¶ 53 We conclude the first, third, fourth, fifth, and sixth factors support a finding of lewdness in this case. *Lamborn,* 185 Ill. 2d at 592. Accordingly, we find exhibits 13 and 14 were "lewd" and constituted child pornography under section 11-20.1(a)(1)(vii) of the Criminal Code.

¶ 54 C. The Jury Instruction for Child Pornography

¶ 55 Defendant argues that the term "lewd" has a specific meaning under Illinois law, and it was error for the trial court not to instruct the jury on the *Lamborn* factors. He contends he was denied his right to a fair trial. We disagree.

¶ 56 Initially, we note defendant failed to offer an alternative jury instruction at trial and he failed to raise the issue in a posttrial motion. He maintains, however, that his forfeiture may be excused under the plain error doctrine. A reviewing court may consider an unpreserved error in the following circumstances:

> " '(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.' " *People v. Thompson,* 238 Ill. 2d 598, 613, 939 N.E.2d 403, 413

(2010) (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007)).

"[A]n instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." (Emphasis omitted.) *People v. Thurow*, 203 Ill. 2d 352, 365, 786 N.E.2d 1019, 1026 (2003). Further, "[i]f a defendant *** fails to tender jury instructions[,] *** he cannot reasonably expect the trial court, unaided, to divine his intent." *People v. Grant*, 71 Ill. 2d 551, 557–58, 377 N.E.2d 4, 7 (1978). "However, the trial court has a duty to instruct the jury further when clarification is requested, when the original instructions are insufficient or when the jurors are manifestly confused." *People v. Sanders*, 368 Ill. App. 3d 533, 537, 857 N.E.2d 948, 952 (2006). "[W]e review for an abuse of discretion the trial court's decision to give a particular jury instruction." *People v. Dorn*, 378 Ill. App. 3d 693, 698, 883 N.E.2d 584, 587 (2008). "This court reviews *de novo* whether the jury instructions, as a whole, accurately conveyed the law." *Id.*

¶ 57 The jury in this case received Illinois Pattern Jury Instruction, Criminal, No. 9.29 (4th ed. 2013) (hereinafter, IPI Criminal 4th No. 9.29) for "child pornography," which provides, in pertinent part, as follows:

> "That such child was depicted or portrayed in a pose, posture or setting involving a lewd exhibition of the fully or partially developed breast of the child if the child is a female."

¶ 58 Defendant contends the above jury instruction for child pornography failed to provide guidance to the jury in its consideration of whether the photos were lewd. He further maintains the evidence was closely balanced and he was denied his right to a fair trial because of

the lack of a jury instruction listing the *Lamborn* factors. In support of his position, defendant cites this court's decision, *People v. McSwain*, 2012 IL App (4th) 100619, ¶ 32, 964 N.E.2d 1174. In that case, we concluded the trial court, in response to the jury's inquiry during deliberations, properly exercised its discretion by not providing the jury with a dictionary definition of "lewd," and instead, providing it with the *Lamborn* factors. *Id.* In *McSwain*, the jury specifically requested a definition of the term "lewd." *McSwain*, 2012 IL App (4th) 100619, ¶ 17. No such request was made in the case at bar, and defense counsel failed to tender an instruction listing the *Lamborn* factors. Moreover, in *McSwain*, we did *not* hold that a jury *must* be instructed as to the *Lamborn* factors in a case involving child pornography. Instead, we simply held it was not error for the trial court to do so.

¶ 59 We conclude the jury was properly instructed as to the offense of child pornography in this case. The trial court was not requested to instruct the jury as to the *Lamborn* factors and it had no affirmative duty to instruct the jury further on the term "lewd." This is particularly so where the jury did not request any clarification and defense counsel failed to tender an alternative instruction at trial. We find no error occurred here, thus there can be no plain error.

¶ 60 III. CONCLUSION

¶ 61 For the reasons stated, we affirm defendant's conviction. As part of our judgment we award the State its $75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2014).

¶ 62 Affirmed.