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IN THE COURT OF APPEALS OF INDIANA

Nathan C. Albrecht,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

March 14, 2022

Court of Appeals Case No. 21A-CR-1560

Appeal from the Dubois Circuit Court

The Honorable Nathan A. Verkamp, Judge

Trial Court Cause No. 19C01-1910-F5-1109

Bradford, Chief Judge.

Case Summary

[1] After a bench trial, the court found Nathan C. Albrecht guilty of ten counts of Level 5 felony possession of child pornography and sentenced him to twenty-one years of incarceration. On appeal, Albrecht argues that the trial court erred

in admitting evidence, that his convictions are not supported by sufficient evidence, and that the trial court erred in sentencing him. We affirm.

Facts and Procedural History

[2] On August 23, 2019, Dubois County Prosecutor's Office Investigator Richard Chambers sought a telephonic warrant to search Albrecht's apartment. Chambers was placed under oath and told the judge that during a forensic interview he observed earlier that day, twelve-year-old R.R. stated that he "had been touched inappropriately in the past six to nine months" by Albrecht, who was involved with the Mentors for Youth program. Tr. Vol. II p. 28. R.R. stated that Albrecht "had placed his mouth on R.R.'s penis on multiple occasions while he was at Mr. Albrecht's apartment in Ferdinand." Tr. Vol. II p. 28. According to Chambers, R.R. further stated that

> on more than one occasion Mr. Albrecht would put something on his penis that was clear in nature, and he would slide it over his penis and that -- on occasion R.R. would use his hand to help put the item on Mr. Albrecht's penis and R.R. then made a motion with his hand that he was going up and down with his hand. And he said then white stuff would come out of Nathan's penis and the clear plastic thing would catch it.

Tr. Vol. II p. 29. R.R. also stated that Albrecht "would commonly get these items from this bathroom in the apartment." Tr. Vol. II p. 29.

[3] Based on R.R.'s statements, Chambers requested a warrant authorizing police to search Albrecht's apartment for "[a] condom or packages of condoms or similar instrumentality believed to be located in the bathroom of the residence as well as to take photographs or video of the residence that was described by

[R.R.]" and "to examine such property, or any part thereof, found on such search." Appellant's App. Vol. II pp. 28, 30. Chambers read the proposed warrant to the judge, who found probable cause to issue it and approved it as written.

[4] Later that day, Ferdinand Police Department Captain Robert Randle and another officer executed the warrant and searched Albrecht's bathroom. On a shelf in a cabinet above the toilet, they found a "sandwich baggie" that had "condoms in it that appeared to have been used or had a human substance inside of them." Tr. Vol. II p. 61. On the same shelf, they "found a large box of condoms where it had been opened, a few had been removed but there's still a lot in there." Tr. Vol. II p. 61. And on a ledge above the bathroom sink mirror, they found another baggie that contained an external computer hard drive, which they seized. Police obtained a second warrant to search the hard drive, which was found to contain thousands of motion pictures and photos of "prepubescent children performing sexual acts." Tr. Vol. II p. 88. Police then obtained three additional warrants to search Albrecht's apartment and other media devices found during those searches.

[5] In October 2019, the State charged Albrecht with ten counts of Level 5 felony possession of child pornography based on ten separate "motion picture[s]" found on the hard drive recovered from his bathroom. Appellant's App. Vol. II

pp. 52–54.[1] Albrecht challenged the validity of the last four search warrants in a motion to suppress, which the trial court denied. Another panel of this Court affirmed that ruling. *Albrecht v. State*, 159 N.E.3d 1004 (Ind. Ct. App. 2020), *trans. denied*.[2]

[6] A bench trial was held in May 2021. Albrecht objected to the admission of the motion pictures, asserting that the initial search warrant "lacked probable cause" and thus the search that resulted in the seizure of the hard drive violated his state and federal constitutional rights. Tr. Vol. II p. 67. The trial court overruled the objection and found Albrecht guilty as charged. The court sentenced him to three years executed on each count, with the sentences for counts one through four to run concurrently and the sentences for counts five through ten to run consecutively to those sentences and to each other, for an aggregate term of twenty-one years. Albrecht now appeals his convictions and sentence.

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[1] In a separate proceeding, Albrecht was charged with and convicted of molesting R.R. *Albrecht v. State*, No. 20A-CR-2190, 2021 WL 2836626 (Ind. Ct. App. July 8, 2021), *trans. denied*.

[2] At the hearing on the motion to suppress, Albrecht, who appeared *pro se*, told the trial court that he had "no problem with [the] initial warrant." Tr. Vol. II p. 15. In appealing from the denial of the motion, Albrecht's counsel "suggest[ed]" that that warrant "had several defects"; however, because Albrecht did not challenge the warrant in his motion and told the trial court that he had "no problem" with it, the appellate panel concluded that he had "waived any appellate challenge" to it. *Albrecht*, 159 N.E.3d at 1014 n.5. In this appeal, the State does not argue that Albrecht is precluded from challenging the initial warrant.

Discussion and Decision

I. Admission of Evidence

[7] Albrecht first contends that the trial court abused its discretion by admitting the motion pictures found on the hard drive seized during the execution of the initial search warrant, claiming that the warrant lacked the requisite probable cause. We typically review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *Cartwright v. State*, 26 N.E.3d 663, 667 (Ind. Ct. App. 2015), *trans. denied*. "When we review a trial court's ruling on the admissibility of evidence resulting from an allegedly illegal search, we do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling." *Id*. But we review de novo the trial court's determination regarding the existence of probable cause to support a search warrant. *Smith v. State*, 982 N.E.2d 393, 405 (Ind. Ct. App. 2013), *trans. denied*.

[8] Both the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution require probable cause for the issuance of a search warrant. *Id*. at 404. The Fourth Amendment provides,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article 1, Section 11 contains nearly identical language. *State v. Spillers*, 847 N.E.2d 949, 953 (Ind. 2006). The warrant requirement is a principal protection against unnecessary intrusions into private dwellings. *Chiszar v. State*, 936

N.E.2d 816, 825 (Ind. Ct. App. 2010), *trans. denied*. To generally deter law enforcement officers from violating citizens' Fourth Amendment rights, the United States Supreme Court has established the exclusionary rule, which prohibits the admission of evidence seized in violation of the Fourth Amendment. *Reinhart v. State*, 930 N.E.2d 42, 48 (Ind. Ct. App. 2010). Indiana also prohibits the admission of evidence seized in violation of Article 1, Section 11. *Wright v. State*, 108 N.E.3d 307, 313–14 (Ind. 2018).

[9] These constitutional rights are codified in Indiana Code section 35-33-5-2, which details the information that a search warrant affidavit must contain. *Spillers*, 847 N.E.2d at 953. Among other things, the affidavit must particularly describe "the house or place to be searched and the things to be searched for[,]" allege "substantially the offense in relation thereto and that the affiant believes and has good cause to believe that … the things sought are concealed there[,]" and set "forth the facts known to the affiant through personal knowledge or based on hearsay, constituting the probable cause." Ind. Code § 35-33-5-2(a). When the affidavit is based on hearsay, it "must either: (1) contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished; or (2) contain information that establishes that the totality of the circumstances corroborates the hearsay." Ind. Code § 35-33-5-2(b). Indiana Code section 35-33-5-8(a) provides that a judge may issue a search warrant without an affidavit "if the judge receives testimony subject to

the penalties for perjury of the same facts required for an affidavit … orally by telephone or radio[,]" as happened here.

[10] In determining whether to issue a search warrant, "'[t]he task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit … there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *Jaggers v. State*, 687 N.E.2d 180, 181 (Ind. 1997) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)) (brackets and ellipsis in *Jaggers*). "The duty of the reviewing court is to determine whether the magistrate had a 'substantial basis' for concluding that probable cause existed." *Id*. (quoting *Gates*, 462 U.S. at 238–39). "Probable cause is a fluid concept incapable of precise definition and must be decided based on the facts of each case." *Smith*, 982 N.E.2d at 404. "The level of proof necessary to establish probable cause is less than that necessary to establish guilt beyond a reasonable doubt." *Jellison v. State*, 656 N.E.2d 532, 534 (Ind. Ct. App. 1995). "Probable cause means a probability of criminal activity, not a prima facie showing." *Fry v. State*, 25 N.E.3d 237, 244 (Ind. Ct. App. 2015), *trans. denied*. It "may be established by evidence that would not be admissible at trial." *Jellison*, 656 N.E.2d at 534. Such evidence may include hearsay, which is an out-of-court statement offered to prove the truth of the matter asserted. Ind. Evidence Rule 801(c).

[11] When we review whether probable cause supported the issuance of a search warrant, we "afford 'significant deference to the magistrate's determination'" and "focus on whether reasonable inferences drawn from the totality of the

evidence support that determination." *Spillers*, 847 N.E.2d at 953 (quoting *Houser v. State*, 678 N.E.2d 95, 98–99 (Ind. 1997)). We consider only the evidence presented to the issuing judge and not post hoc justifications for the search. *Jaggers*, 687 N.E.2d at 182. "'A presumption of validity of the search warrant exists, and the burden is upon the defendant to overturn that presumption.'" *Rios v. State*, 762 N.E.2d 153, 156–57 (Ind. Ct. App. 2002) (quoting *Snyder v. State*, 460 N.E.2d 522, 529 (Ind. Ct. App. 1984)). "In determining whether an affidavit provided probable cause for the issuance of a search warrant, doubtful cases should be resolved in favor of upholding the warrant." *State v. Shipman*, 987 N.E.2d 1122, 1126 (Ind. Ct. App. 2013).

[12] Albrecht challenges the validity of the search warrant on two grounds, the first being that it was based on stale information. "The information contained in a search warrant affidavit must be timely." *Bailey v. State*, 131 N.E.3d 665, 680 (Ind. Ct. App. 2019), *trans. denied*. "The general rule is that stale information cannot support a finding of probable cause, but rather, only gives rise to a mere suspicion." *Seeley v. State*, 782 N.E.2d 1052, 1060 (Ind. Ct. App. 2003), *trans. denied*, *cert. denied*. "This is true especially when the items to be obtained in the search are easily concealed and moved." *Id.* "Nevertheless, the exact moment information becomes stale cannot be precisely determined. We must look to the facts and circumstances of each case to determine whether the facts and information contained in the search warrant affidavit are stale." *Bailey*, 131 N.E.3d at 680 (internal citation omitted).

[13] Albrecht argues, "Given that the timeframe given by Officer Chambers was 'in the past six to nine months' and the items being searched for (condoms) are easily disposed of and moved, the information was tainted by staleness and could not support a finding of probable cause." Appellant's Br. at 24. Albrecht fails to acknowledge the second justification given when requesting the search warrant: "to photograph or videotape the interior of the residence for the purposes of comparing it with R.R.'s description." Tr. Vol. II p. 30. While one might expect that condoms may be used or discarded over the course of six to nine months, the layout of Albrecht's apartment was unlikely to change. Again, R.R. reported that Albrecht sexually molested him numerous times in Albrecht's apartment, using a condom on at least one occasion, and, in reporting the alleged sexual encounters, described Albrecht's apartment with some degree of specificity. Investigating officers sought to corroborate R.R.'s allegations by photographing the interior of Albrecht's apartment, where R.R. alleged the sexual encounters occurred. Given that investigating officials sought permission not just to look for condoms but also to photograph the interior of the apartment where the reported sexual encounters were alleged to occurred, coupled with the fact that the interior layout of the apartment was not likely to change, we cannot say that the information supporting the search warrant was impermissibly stale.

[14] Albrecht also argues that "Officer Chambers did not establish the credibility of [R.R.] and did not testify to information establishing that the totality of the circumstances corroborated the hearsay as required by statute." Appellant's Br.

at 24. The State notes that Albrecht "makes no argument to this Court why R.R.'s statements were unreliable other than merely calling them uncorroborated hearsay" and suggests that "this argument should be held waived." Appellee's Br. at 21. We agree. "Bald assertions of error unsupported by either cogent argument or citation to authority result in waiver of any error on review." *Pasha v. State*, 524 N.E.2d 310, 314 (Ind. 1988). Albrecht has therefore failed to overcome the presumption that the initial search warrant was valid. As such, the hard drive, which, while noticed during the first search, was not recovered until investigating officers obtained a subsequent valid search warrant, was not tainted as fruit coming from the poisonous tree. We therefore conclude that the trial court did not abuse its discretion in admitting the motion pictures found on the hard drive seized during the execution of that warrant.[3]

II. Sufficiency of the Evidence

[15] Albrecht next contends that his ten convictions are not supported by sufficient evidence. "When reviewing a challenge to the sufficiency of the evidence underlying a criminal conviction, we neither reweigh the evidence nor assess the credibility of witnesses." *Bailey v. State*, 979 N.E.2d 133, 135 (Ind. 2012). "The evidence—even if conflicting—and all reasonable inferences drawn from

[3] Consequently, we do not address Albrecht's argument regarding the applicability of the good-faith exception to the exclusionary rule, except to say that the search warrant was not required to "state an alleged crime[,]" as Albrecht claims, Appellant's Br. p. 26, and that Chambers recited facts that substantially alleged the crime of child molesting, as required by Indiana Code Section 35-33-5-2(a).

it are viewed in a light most favorable to the conviction." *Id*. A conviction may be supported by circumstantial evidence alone, and that evidence need not "overcome every reasonable hypothesis of innocence." *McCoy v. State*, 153 N.E.3d 363, 366–67 (Ind. Ct. App. 2020). Moreover, "the evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." *Brown v. State*, 827 N.E.2d 149, 152 (Ind. Ct. App. 2005).

[16] The State alleged that Albrecht committed ten counts of Level 5 felony possession of child pornography by knowingly or intentionally possessing, with intent to view, ten motion pictures that lack serious literary, artistic, political, or scientific value and that depict or describe sexual conduct by a child who appears to be less than eighteen years of age. Specifically, in the first four motion pictures, the child is less than twelve years of age; in the fifth, the child is less than twelve and is engaged in such conduct by force; in the sixth, the child engages in bestiality; in the seventh, the child is less than twelve and is engaged in such conduct by force; in the eighth, the child is less than twelve and is engaged in such conduct by force and appears to be receiving bodily injury, *i.e.*, appears to be in pain; in the ninth, the child is less than twelve and is verbally and physically resisting and in pain; and in the tenth, the child is less than twelve. *See* Appellant's App. Vol. II pp. 53–54 (charging information); Ind. Code § 35-42-4-4(e) (listing factors that elevate offense from Level 6 felony to Level 5 felony).

A. All Counts–Whether the State Proved that Albrecht Possessed the Hard Drive Which Contained the Images/Motion pictures in Question

[17] Albrecht's overarching argument is that the State failed to prove beyond a reasonable doubt that he knowingly or intentionally possessed the motion pictures. "A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." Ind. Code § 35-41-2-2(b). "A person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so." Ind. Code § 35-41-2-2(a). "It is well-settled that in criminal cases, the State 'is not required to prove intent by direct and positive evidence.'" *Chastain v. State*, 58 N.E.3d 235, 240 (Ind. Ct. App. 2016) (quoting *Johnson v. State*, 837 N.E.2d 209, 214 (Ind. Ct. App. 2005), *trans. denied*), *trans. denied*. "A defendant's intent may be proven by circumstantial evidence alone, and knowledge and intent may be inferred from the facts and circumstances of each case." *Id*.

[18] Albrecht notes that the external hard drive on which the motion pictures were found was not on his "physical person" and that "the State presented no physical evidence, such as fingerprints," to connect him with it. Appellant's Br. p. 31. He further notes that the State presented no evidence as to how many people lived in the apartment or who had access to it, and that the hard drive "was hidden from plain view, and the State presented no evidence that [he] knew that [it] was located where it was." Appellant's Br. p. 31.

[19] "To prove that a defendant possessed an item, the State may prove either actual possession or constructive possession. Actual possession occurs when a person has direct physical control over an item." *Eckrich v. State*, 73 N.E.3d 744, 746 (Ind. Ct. App. 2017) (citation omitted), *trans. denied*. Constructive possession is proven when the State shows that the defendant has both the intent and the capability to maintain dominion and control over it. *Chandler v. State*, 816 N.E.2d 464, 467 (Ind. Ct. App. 2004). Proof of a possessory interest in the premises where contraband is found is adequate to show capability to maintain dominion and control, regardless of whether possession of the premises is exclusive. *Id*. Albrecht does not dispute that he had a possessory interest in the apartment in which the hard drive was found, and in fact Captain Randle testified that he believed that the apartment was Albrecht's residence. Tr. Vol. II p. 58. Thus, the State established that Albrecht had the capability to maintain dominion and control over the hard drive and the motion pictures stored on it.

[20] But, as Albrecht correctly points out, the State did not establish that he had exclusive possession of the apartment. Where control of the premises "is non-exclusive, intent to maintain dominion and control may be inferred from additional circumstances that indicate the person knew of the contraband." *Chandler*, 816 N.E.2d at 467. Here, the hard drive was found in the same room as the condoms that R.R. described during his forensic interview. Also, Jasper Police Department Detective Martin Loya, who conducted a forensic examination of the external hard drive, testified that he found a "shortcut" on

that drive that was linked to the internal hard drive ("'C' drive") of a computer, and the shortcut indicated that "Nathan" is "the person who uses" that computer. Tr. Vol. II p. 96. From this evidence, a trier-of-fact could reasonably infer that Albrecht, who lived in the apartment and whose first name is Nathan, intended to maintain dominion and control over the external hard drive and the motion pictures found on it, *i.e.*, that he knowingly or intentionally possessed them.[4]

B. Count Nine–Whether the Motion Picture in Question Constituted a Criminal Act

[21] Albrecht challenges the sufficiency of the evidence supporting his conviction on count nine, which alleged that he knowingly or intentionally possessed

> a motion picture that depicts or describes sexual conduct by a child who appears to be less than eighteen (18) years of age and that lacks serious literary, artistic, political or scientific value and the child who is depicted or described is less than twelve [and] is verbally physically resisting and is in pain, to-wit: File name Pro rebel beats and tortures young Syrian boy in Greece.

Appellant's App. Vol. II p. 54. There is no dispute that the motion picture's content is as follows:

> [A] naked young boy[5] is standing in a shower stall. Then, [the videographer] slaps this child in the face 12 different times. Six

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[4] Albrecht asserts that "the State did not present any evidence showing that there was a 'C' drive with a user 'Nathan' on any of [his] electronic devices" or that "the images on the external hard drive were ever viewed on any of [his] electronic devices." Appellant's Br. p. 31. These assertions are merely impermissible invitations to reweigh the evidence regarding his awareness of the hard drive's contents.

[5] Albrecht acknowledges that the boy "looks to be two or three years old[.]" Appellant's Br. p. 34.

> of the times, the blows led the child to fall to the floor of the shower, fully revealing his genital area. After the abuser fights off another person's prior two attempts to rescue the child, this other person is able to extract the child from the shower.

Appellee's Br. pp. 10–11 (record citations omitted). Indiana Code Section 35-42-4-4(a)(4)(C)(i) defines "sexual conduct[,]" *inter alia*, as "exhibition of the […] uncovered genitals […] intended to satisfy the sexual desires of any other person[.]" Indeed, our review of the record reveals that the child's genitals are clearly visible several times. As for the requirement that the exhibition of uncovered genitals be intended to satisfy the sexual desires of any other person, we conclude that it has been satisfied here. The motion picture at issue is no innocent home video of a child bathing; it depicts a vicious beating of a naked child whose genitals are clearly visible. The context of the exhibition is sufficient to support an inference that it was intended to satisfy the sexual desires of another person, thereby satisfying the requirements of Section 35-42-4-4(a)(4)(C)(i).

[22] Albrecht's argument seems to assume that the State was somehow required to prove "sadomasochistic abuse[,]" Ind. Code § 35-42-4-4(a)(4)(D), which Indiana Code Section 35-49-1-8 defines as "flagellation or torture by or upon a person as an act of sexual stimulation or gratification." It is true that Albrecht argued below that the motion picture did not depict sadomasochistic abuse and that the trial court found him guilty on the basis that it did. We, however, are bound neither by Albrecht's argument nor the trial court's rationale, as it is well-settled that we "will affirm a conviction on any basis fairly presented by

the record." *Mesarosh v. State*, 459 N.E.2d 426, 428 (Ind. Ct. App. 1984). The exhibition of the uncovered genitals of the child in the motion picture is sufficient to sustain Albrecht's conviction on count nine.

[23] In any event, we reject Albrecht's argument that no reasonable fact-finder could conclude that the motion picture depicts sadomasochistic abuse. The term "torture" is generally defined as "[t]he infliction of intense pain (as from burning, crushing, or wounding) to punish, coerce, or afford sadistic pleasure." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2414 (Phillip Babcock Gove et al. eds., G.&C. Merriam Company 1964). Given that the motion picture depicts an adult male repeatedly striking a small child, who is crying the entire time, the trial court was free to find this intentional infliction of pain to be torture.

[24] Albrecht also argues that no reasonable fact-finder could find that the actions depicted in the motion picture, even if torture, were intended as an act of sexual stimulation or gratification. In support of this assertion, Albrecht argues that the motion picture does not focus on the child's genitals and notes that no one is seen performing any sexual acts or heard saying anything of a sexual nature. Appellant's Br. at 34, 35. While the child's genitals may not be the sole focus of the motion picture, they are, as mentioned, clearly visible at several points. If, as Albrecht suggests, the motion picture had been made with no sexual purpose in mind, then there would have been no need for the child's genitals to be visible at all. Consequently, we agree with the State that "the nudity provided sufficient sexual context to meet the definition of sadomasochistic abuse."

Appellee's Br. p. 29. Moreover, keeping in mind that the motion picture in question was found on the same hard drive with other explicit material, the trial court was free to conclude that (1) Albrecht originally found it in place where one goes to find child pornography and (2) it was originally deposited there because it was made in that spirit. The State produced sufficient evidence to sustain Albrecht's conviction on count nine.

III. Constitutionality of the Statute

[25] With respect to count nine, Albrecht alternatively contends that his conviction must be reversed because the statutory definition of the term "sadomasochistic abuse" is unconstitutionally vague. "A challenge to the constitutionality of a statute is a pure question of law, which we review *de novo*." *State v. Thakar*, 82 N.E.3d 257, 259 (Ind. 2017) (internal quotation omitted). "All statutes are presumptively constitutional, and the court must resolve all reasonable doubts concerning a statute in favor of constitutionality." *Id*.

[26] As previously mentioned, we need not address this claim on the merits because Albrecht's conviction on count nine can be affirmed on another basis. Moreover, Albrecht did not challenge this conviction on constitutional grounds below, and "challenges to the constitutionality of a criminal statute generally must be raised through a motion to dismiss prior to trial, and the failure to do so waives the issue on appeal." *Wells v. State*, 848 N.E.2d 1133, 1146 (Ind. Ct. App. 2006); *see also Adams v. State*, 804 N.E.2d 1169, 1172 (Ind. Ct. App. 2004) (providing that because Adams failed to file a motion to dismiss and did not object to the constitutionality of the statute at trial, the issue was waived and

could not be raised for the first time on appeal). Because Albrecht neither moved to dismiss on this ground or argued that the term "sadomasochistic abuse" was unconstitutionally vague at trial, he has waived this issue for appellate review.[6] *See Adams*, 804 N.E.2d at 1172.

IV. Alleged Sentencing Error

[27] Albrecht last contends that the trial court erred in sentencing him. He points to Indiana Code Section 35-50-1-2(c), which states in pertinent part that a trial court "shall determine whether terms of imprisonment shall be served concurrently or consecutively[,]" with the proviso that, "except for crimes of violence, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under [habitual offender statutes] to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the period described in subsection (d)." Possession of child pornography is not one of the crimes of violence listed in the statute, and "'episode of criminal conduct' means offenses or a connected series of offenses that are closely related in time, place, and circumstance." Ind. Code § 35-50-1-2(b). Indiana Code Section 35-50-1-2(d) states that "the total of the consecutive terms of imprisonment to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct may not exceed" seven years if the most serious crime for which he is sentenced is a Level 5

[6] While Albrecht acknowledges that he did not raise this argument in either a pre-trial motion to dismiss or at trial, he invites us to consider the merits despite his waiver of the issue for appellate review. We decline this invitation.

felony. Albrecht argues that his sentence for ten counts of Level 5 felony possession of child pornography should be no longer than seven years because his offenses arose out of an episode of criminal conduct. We disagree.

[28] "In its sound discretion, a trial court may impose consecutive or concurrent terms of imprisonment." *S.B. v. State*, 175 N.E.3d 1199, 1202-03 (Ind. Ct. App. 2021). Indiana Code Section 35-50-1-2 limits that discretion, however, "'and the trial court's discretion does not extend beyond the statutory limits.'" *Id*. at 1203 (quoting *Edwards v. State*, 147 N.E.3d 1019, 1021 (Ind. Ct. App. 2020)). "'Therefore, in reviewing a sentence, we will consider whether it was statutorily authorized.'" *Id*. (quoting *Edwards*, 147 N.E.3d at 1021).

[29] The State presented evidence tending to show that the pornographic motion picture files were downloaded to the external hard drive found in Albrecht's apartment on different dates over the course of several years. (State's Ex. 4) Albrecht asserts that there is no evidence that he was the one who actually downloaded the files onto the hard drive; he further asserts that he could have acquired the hard drive after the downloads were completed, and thus his act of possessing the images was a single episode of criminal conduct. Given the presence of the abovementioned shortcut on the hard drive that was linked to a computer user named Nathan, we reject Albrecht's argument as an invitation to reweigh the evidence in his favor. We find no abuse of discretion and therefore affirm his sentence. *See Edwards*, 147 N.E.3d at 1025 ("Common sense dictates that the simultaneous, or near-simultaneous, acquisition of several of the [pornographic] images would most likely constitute a single episode of criminal

conduct, while the acquisition of the same images separately over the course of several days, weeks, or months would most likely not.").

[30] The judgment of the trial court is affirmed.

Crone, J., concurs in part and dissents in part with opinion.

Tavitas, J., concurs.

IN THE
COURT OF APPEALS OF INDIANA

Nathan C. Albrecht,
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v.

State of Indiana,
Appellee-Plaintiff

Court of Appeals Case No.
21A-CR-1560

Crone, Judge, concurring in part and dissenting in part.

[1] While I agree with most of the majority's extremely well-researched and articulate opinion, I respectfully dissent from its affirmance of Albrecht's conviction on count 9, for several reasons.

[2] First, contrary to the majority's suggestion, Albrecht correctly assumes that, pursuant to Indiana Code Section 35-42-4-4, the State was required to prove that the motion picture at issue depicted "sexual conduct by [the] child" in the form of "sadomasochistic abuse," which Indiana Code Section 35-49-1-8 defines as "flagellation or torture by or upon a person as an act of sexual stimulation or gratification."[7] Here, the torturer's conduct is deplorable, and

[7] I agree with the majority that Albrecht has waived his constitutional vagueness claim regarding the term "sadomasochistic abuse."

Albrecht's possession of the motion picture might be objectionable, but it is not illegal based on the plain language of Indiana Code Section 35-42-4-4. The child's incidental nudity might have been sexually stimulating or gratifying to Albrecht, but that is irrelevant for purposes of the statute.

[3] There is simply nothing from which a finder of fact could reasonably infer that the torture depicted in the motion picture was an act of sexual stimulation or gratification for either the torturer or the child, which, as Albrecht correctly suggests, is what the statute requires. The majority sidesteps this argument, stating,

> While the child's genitals may not be the sole focus of the motion picture, they are, as mentioned, clearly visible at several points. If, as Albrecht suggests, the motion picture had been made with no sexual purpose in mind, then there would have been no need for the child's genitals to be visible at all. Consequently, we agree with the State that "the nudity provided sufficient sexual context to meet the definition of sadomasochistic abuse."

Slip op. at 16-17 (quoting Appellee's Br. at 29).

[4] Under the majority's analysis, which also sidesteps Albrecht's argument that the State failed to prove that the motion picture "lacks serious literary, artistic, political, or scientific value" as per Indiana Code Section 35-42-4-4(d), one could be subject to a felony prosecution for possessing a copy of the world-renowned Pulitzer-Prize-winning photo "The Terror of War," commonly known as "Napalm Girl," by photojournalist Nick Ut, which depicts a naked nine-year-old Vietnamese girl fleeing her village after being severely burned in a

napalm bomb attack in 1972.[8] A factfinder could conclude that the girl was tortured by the airman who dropped the bomb that inflicted third-degree burns on thirty percent of her body, and although the girl's genitals may not be the sole focus of the photo, they are clearly visible. Thus, the nudity would provide sufficient sexual context to meet the majority's definition of sadomasochistic abuse, and any person who knowingly or intentionally possessed the photo would be guilty of possessing child pornography.[9]

[5] All of which is nonsense, of course, because there is no evidence that the airman tortured the girl as an act of sexual stimulation or gratification, which is specifically required for a conviction under Indiana Code Section 35-42-4-4. Likewise, there is no evidence that the torture of the child in this case was an act of sexual stimulation or gratification. Albrecht points out that "the video does not focus on the child's genitals[,]" "[n]o one is seen masturbating in the

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[8] An informative history and two versions of the photo may be found in Martin Kaninsky's *Story Behind The The Terror of War: Nick Ut's "Napalm Girl" (1972)*, about photography blog (Oct. 26, 2019), https://aboutphotography.blog/blog/the-terror-of-war-nick-uts-napalm-girl-1972 **[https://perma.cc/C5ZD-2PRF].**

[9] Moreover, under the majority's analysis, the distribution of graphic photos depicting naked men held captive by American service members in Iraq's Abu Ghraib prison could subject the distributor to prosecution for class A misdemeanor distribution of obscene matter. *See* Ind. Code §§ 35-49-3-1 (providing that a person who knowingly or intentionally distributes "obscene matter" to another person commits a class A misdemeanor); 35-49-1-3 (defining "matter" in pertinent part as any photograph or digitized image); 35-49-2-1 (providing that matter is "obscene" for purposes of Indiana Code Article 35-49 if "(1) the average person, applying contemporary community standards, finds that the dominant theme of the matter …, taken as a whole, appeals to the prurient interest in sex; (2) the matter … depicts or describes, in a patently offensive way, sexual conduct; and (3) the matter …, taken as a whole, lacks serious literary, artistic, political, or scientific value"); and 35-49-1-9 (defining "sexual conduct" in pertinent part as "sado-masochistic abuse"); *see also* Wired.com Staff, *Disturbing New Photos From Abu Ghraib* (Mar. 28, 2008), https://www.wired.com/2008/03/gallery-abu-ghraib/**[https://perma.cc/Q5M7-E3H2]**.

video or otherwise performing any sexual acts as the child is hit[,]" and "[n]othing of a sexual nature is heard during the video." Appellant's Br. at 34, 35. Based on the plain language of Indiana Code Section 35-42-4-4, the child's mere nudity is insufficient to sustain Albrecht's conviction. *Cf.* *Siebenaler v. State*, 124 N.E.3d 61, 69-70 (Ind. Ct. App. 2019) (in which author of this opinion concurred in then-Chief Judge Vaidik's reversal of defendant's convictions for possession of child pornography and child exploitation that were based on photo and videos that depicted "mere nudity," which is protected expression under the First Amendment to the United States Constitution, and were neither "focused on the genitals" nor "sexually suggestive"), *trans. denied*.

[6] Second, the majority's affirmance of Albrecht's conviction based on sexual conduct other than sadomasochistic abuse raises insurmountable due process concerns. The majority's reliance on *Mesarosh v. State* for the proposition that we "will affirm a conviction on any basis fairly presented by the record" is misplaced. Slip op. at 15-16 (quoting *Mesarosh*, 459 N.E.2d at 428). In that case, the issue was whether the defendant's "obscene language directed to police officers[,]" which formed the basis for his disorderly conduct conviction, "was protected under his right to freedom of speech[.]" *Mesarosh*, 459 N.E.2d at 427. The *Mesarosh* court affirmed the conviction "by applying the 'fighting words' doctrine[,]" *id.* at 428, which apparently was not done at the trial court level. And in the case that the *Mesarosh* court cited in support of the above quotation, *Cain v. State*, 261 Ind. 41, 300 N.E.2d 89 (1973), the issue was the trial court's exclusion of hearsay; the *Cain* court noted that it could "sustain the action of

the trial court[,]" i.e., the trial court's evidentiary ruling, "if it can be done on any legal ground on the record." *Id*. at 45-46, 300 N.E.2d at 92. Neither *Mesarosh* nor *Cain* stands for the proposition that we may affirm a conviction on a basis that violates due process.

[7] Speaking of which, although Count 9 of the charging information does not specifically allege that the sexual conduct depicted in the motion picture constituted "sadomasochistic abuse" pursuant to Indiana Code Section 35-42-4-4(a)(4)(D), the motion picture's file name and content strongly suggest that that was the basis of the charge, and that is obviously how Albrecht's counsel interpreted it. *See* Tr. Vol. 2 at 98-99 ("It's certainly grotesque and not a good thing, but it doesn't -- the abuse of a child does not constitute sexual conduct under the definition in 35-42-4-4."). The deputy prosecutor did not disagree with that interpretation,[10] and the trial court specifically found Albrecht guilty on that basis. *See id*. at 99 ("[T]he Court would find that pursuant to 35-42-4-4 […] sexual conduct means, sadomasochistic abuse."). I do not see how we may affirm a conviction based on a charge that the State did not make and did not try and that Albrecht did not have a meaningful opportunity to defend at trial, let alone challenge on appeal. *See McGairk v. State*, 399 N.E.2d 408, 411 (Ind. Ct. App. 1980) (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)) ("It is of course axiomatic that a conviction upon a charge not made or upon a charge not tried

[10] Tellingly, the attorney general's office has adopted that interpretation on appeal. *See* Appellee's Br. at 29 ("The child was tortured, or at least any reasonable juror could come to this conclusion watching the video, and the nudity provided sufficient sexual context to meet the definition of sadomasochistic abuse.").

constitutes a denial of due process. This concept reflects the basic constitutional premise that a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend.").

[8] And third, due process considerations aside, I do not believe that the conviction as reimagined by the majority is supported by sufficient evidence. Indiana Code Section 35-42-4-4 is written in terms of a motion picture depicting "sexual conduct by a child"; thus, it must be the child who exhibits his "uncovered genitals" with the intent "to satisfy or arouse the sexual desires of any person[.]" Ind. Code § 35-42-4-4(a)(4)(C)(i). That is not what happened here, because the two- to three-year-old child is obviously too young to form such salacious intent. The majority's attempt to transfer that intent to anyone other than the child is contrary to the plain language of the statute. In sum, although I do not condone Albrecht's possession of the motion picture, I would reverse his conviction on count 9 for insufficient evidence and affirm as to the other nine counts.