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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR 09-1068

	Opinion Delivered MARCH 10, 2010
SHAWN DELL WHITESIDE APPELLANT	APPEAL FROM THE LONOKE COUNTY CIRCUIT COURT [NO. CR-08-387-2]
V.	HONORABLE PHILLIP T. WHITEAKER, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Shawn Whiteside appeals his convictions for two counts of distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child, related to photographs of two naked eleven-year-old girls. Appellant was found guilty of seven other counts of this crime as well as one count of computer exploitation of a child, but he does not appeal those convictions. His sole contention on appeal is that the trial court erred in denying his motion for directed verdict because these two particular images did not contain "sexually explicit conduct." After reviewing this appeal under the proper standards, we affirm.

When a defendant challenges the sufficiency of the evidence, the evidence is viewed in the light most favorable to the State. *Dixon v. State*, 310 Ark. 460, 839 S.W.2d 173 (1992). Only evidence supporting the verdict will be considered. *McGehee v. State*, 328 Ark. 404, 943 S.W.2d 585 (1997). As charged herein, appellant was accused of violating Ark. Code Ann.

§ 5-27-602(a) (Repl. 1997), which required proof that the image contained a child engaging in sexually explicit conduct. As defined by Ark. Code Ann. § 5-27-601(15), and as relevant to this case, this required evidence of a "lewd exhibition of the genitals or pubic area of any person or the breast of a female." Appellant challenges whether the pictures, showing full frontal nudity of the girls standing by a bathtub, were a "lewd exhibition." "Lewd" has been defined in our case law to include indecency, which would mean offensive to common propriety or offensive to modesty or delicacy. *See Gabrion v. State*, 73 Ark. App. 170, 42 S.W.3d 572 (2001).

Appellant asserts that these photographs were innocent depictions of girls having fun. He argues that because these photographs were not offensive to common propriety, modesty, or delicacy, the jury should not have been allowed to consider the charges related to those images. We disagree.

The evidence at the jury trial included the testimony of a detective with the Lonoke County Sheriff's Office. One girl's mother reported to him that appellant possessed a nude photograph of her daughter and another child, taken in 2006. After obtaining a search warrant, the detective searched appellant's home and storage unit, finding photographs of young teen girls exposing their breasts. Law enforcement also seized appellant's computer, numerous pornographic magazines featuring young girls, and video tapes. A digital analyst with the State Crime Laboratory testified that he located approximately two hundred child pornography images on appellant's computer. On one video tape, appellant was seen in

attendance at an after-prom party dating back to 2004. At that party, some of the teenage females were bare-breasted, drinking alcohol.

The State called one of the girls who attended that party to testify. She explained that appellant held the party, that she was sixteen years old at that time, that appellant and his wife supplied the alcohol, and that she was in the photographs with her shirt off, but that she did not remember doing that due to intoxication.

Both child victims in this case, H.G. and B.S., testified at trial, when they were age fourteen. H.G. said that she and B.S. were spending the night with appellant and his wife when those photos were taken. She and B.S. were bathing when appellant's wife came in and started taking pictures. Appellant later showed the girls the photos on his computer. It made H.G. uncomfortable, and B.S. asked him to delete them. The girls denied that they were engaging in anything sexual when they were photographed; rather, they explained it as girls being silly and having fun.

On this evidence, appellant moved for directed verdicts regarding those two photographs, asserting that they did not contain lewd material. The trial judge denied the motion, the jury considered the evidence, and appellant was convicted. This appeal followed.

We conclude that the trial court did not err. The State presented compelling evidence that appellant previously hosted a party for teenagers at his home, provided alcohol for the minors, and captured images of underage girls in partial undress. These particular photographs at issue, while mild in comparison to the other images in appellant's possession, were at the

very least indecent. The context within which these images were found, among quantities of child pornography, lend more strength to the assertion that these images were possessed for lewd purposes.

The definition of lewd is more inclusive and not simply synonymous with the word "obscene." *See Gabrion*, *supra*. These two counts were properly submitted to the jury for it to decide whether appellant was guilty.

Affirmed.

GLOVER and MARSHALL, JJ., agree.