IN THE COURT OF APPEALS OF IOWA

No. 3-058 / 12-0575
Filed March 13, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DONALD WAY ZIEMAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Clay County, Charles K. Borth, District Associate Judge.

Defendant appeals his conviction for dissemination of obscene material to a minor and prostitution. **AFFIRMED.**

Alfredo Parrish and Andrew Dunn of Parrish Kruidenier Dunn Boles Gribble Parrish Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sheryl Soich, Assistant Attorney General, and Michael J. Houchins, County Attorney, for appellee.

Heard by Vogel, P.J., and Potterfield and Doyle, JJ.

VOGEL, P.J.

Donald Zieman appeals from his conviction of two counts of dissemination of obscene material to a minor, a serious misdemeanor, in violation of Iowa Code section 728.2 (2009), and three counts of prostitution, an aggravated misdemeanor, in violation of Iowa Code section 725.1. Zieman asserts on appeal (1) the district court abused its discretion in permitting the introduction of prior acts evidence, (2) his counsel rendered ineffective assistance in a number of ways, (3) the district court erred in failing to grant his motion for judgment of acquittal, and (4) the district court abused its discretion in failing to grant his motion to sever the charges. We affirm.

Because the prior acts evidence came in after an unreported discussion with the court, we have no specific objection to review. However, we find the evidence was more probative than prejudicial and was needed to clarify confusion in the testimony created on cross-examination under the doctrine of curative admissibility and Iowa Rule of Evidence 5.106(a). We preserve Zieman's ineffective-assistance-of-counsel claims for possible postconviction relief proceedings. Sufficient evidence supports Zieman's convictions, and because each charge carried a common scheme or plan, the district court did not abuse its discretion in denying Zieman's motion to sever the charges.

I. BACKGROUND FACTS AND PROCEEDINGS.

The convictions in this case arise out of Zieman's employment of three male teenagers to perform work on his farm. Two of the victims, L.C. and J.D., were eighteen at the time of the incidents, and one victim, M.G., was seventeen. Zieman contacted M.G. at a local grocery store and asked him if he would like to

make some extra money by assisting him on his farm. M.G. accepted the offer and invited L.C. and J.D. to work for Zieman too. According to the work records kept by Zieman, M.G. worked for him from April 18 through June 10, 2010, L.C. worked from May 4 through October 20, and J.D. worked from April 18 through October 20.

M.G. testified at trial that the initial working relationship was good. However, Zieman started initiating unwelcomed touching of M.G. while the two worked together. M.G. asked Zieman to stop, and Zieman did. One day Zieman asked M.G. to retrieve a box containing VHS tapes from his outbuilding. After retrieving the box, Zieman asked M.G. to "put one of the VCR tapes inside the VCR" to see if the unit still worked. M.G. grabbed a tape off the top of the box and put it in. Zieman had made popcorn, and the two ate the popcorn while watching the tape. M.G. described the tape as follows:

> [A]t first it was like a sex ed video, and it was, the guy was a teacher and he was explaining to, looked like college age students, about how once you—if a penis is inserted into the butt, you can't put it back in a vagina because it would cause infection and then it cut into like a hard core porn video.

M.G. went on to describe the video as depicting "vaginal penetration between a man and a female." After observing the video, M.G. felt awkward and asked if there was more work to do. The two left and continued working.

In a second incident, M.G. described that Zieman asked him to sweep out a wooden patio at the end of the day. Zieman offered M.G. a beer and a cigar. Then Zieman plugged a black box into the television and ordered what M.G. described as "porn off pay-per-view." M.G. described the video as "a collection of different females giving oral sex to guys." M.G. again described the situation

as awkward because Zieman repeatedly asked him if the video was "giving you a hard on." The prosecutor then asked M.G. if "anything else happen on that particular day." M.G. responded:

> Yes, sir. He at some point asked me if, well, he told me a story, and then he asked me if I would face fuck him, which was involved with the story that he had previously said, and it was basically he wanted to have me put my package into his mouth, and he wanted to take my cum is what he said and he was willing to pay me for it.
>
> Q. How much was he willing to pay you for that? A. A hundred dollars. And then he wanted—then he changed the deal like a hundred twenty if I did it this time and then just jacked off in front of him next time.
>
> Q. Okay. What did you do after—this was during the same date you watch the pay-per-view? A. Yes, sir.
>
> Q. Okay. And did you ever agree to that? A. No, sir.
>
> Q. Okay. What happened then after this conversation with him about performing a sex act on him? A. He kept pressuring me to do it, just saying stuff like "it will feel just like a vagina," "no one would have to know." And then I said, "No, I think I am going to go now." I stood up, and then he said he was going to pay me for that day, and so we went out to the Morton building where he keeps his files for like what we have done that day, and I wrote down what I had done that day. He paid me, and then I left.

M.G. described one more incident where Zieman asked him to "just jack off in front of him." He told Zieman that the proposition bothered him, and he never worked for Zieman again. However, M.G. did attend a party at Zieman's farm later in the summer with L.C., J.D., and other friends. M.G. consumed alcohol and smoked cigars provided by Zieman. At the party they played cards, and there was also a video playing on the DVD player, but M.G. did not observe what was on the screen.

During cross-examination, defense counsel focused on M.G.'s inability to remember the dates of the incidents alleged, which M.G. attributed to his ADHD. Counsel asked M.G. why he kept returning to work for Zieman despite the

behavior that M.G. found offensive and asked whether M.G. was mad Zieman had denied his request for an advance on his pay. Counsel also revisited the facts surrounding the prostitution allegation. Counsel asked:

> Well, isn't it true in the statement that you gave to [Deputy] Ortiz that you said that you would perform a sex act for one hundred dollars, not Mr. Zieman. A. You are twisting my words a little bit I think in there.
>
> Q. I'm not twisting them at all. I'm looking at your statement. I'm happy to present that to you. A. Would you?
>
> . . . .
>
> Q. All right. Would you read the yellow portion that I've highlighted, would you read that to the jury? A. Yes, sir. (Reading) "That night I said 100 dollars, said well how about 120 then."
>
> Q. You said that? A. If you want me to read the whole paragraph, I can do that, too.
>
> Q. Read that part that we just— A. The whole paragraph?
>
> Q. —just talked about. A. Just the highlighted part? (Reading) "That night I said 100 dollars, said well how about 120 dollars then."
>
> Q. Mr. Zieman didn't ask you. You said, you said you would perform a sex act for 100 dollars? A. He asked me—
>
> Q. Just a minute. "I said 100 dollars," these are your words. A. Yes, sir.
>
> Q. (Reading) "He thought about it for a while and said alright that would be okay. I said well how about 120 then." A. You want to read the parts in between that, too?
>
> Q. Sure. A. Maybe around it. I think there was parts you got to skip over there 'cause we are not allowed to speak about it.
>
> Q. Well, let me ask you this. That's your statement, correct? A. Yes, sir.
>
> Q. That's a statement that you gave to a deputy sheriff on October 29, 2010, in which you offered to perform, you stated you offered to perform a sex act for 100 dollars, correct? A. That's—
>
> [Prosecutor]: That's not what it says.
>
> [Defense counsel]: It says—it says "I said 100 dollars."
>
> [Prosecutor]: Why don't you read the paragraph four sentences above that?
>
> The Court: Is the exhibit going to be offered?
>
> [Defense counsel]: Where do you want me to start, Mike?
>
> [Prosecutor]: Are you going to make that as an exhibit?
>
> [Defense counsel]: No. I'm just asking him if he made that statement.

> The Court: Either way [the Prosecutor] will have an opportunity to address the remainder of the statement if he feels it's necessary. Go ahead, [Defense counsel].
>
> Q. Did you make that statement? A. Yes, sir.

On redirect examination, the prosecutor did address the statement again, and he asked M.G. to read part of his statement to the jury.

> Q. Okay. I'm going to have you start right here, and that would be on Page 3 of the exhibit and read each sentence slowly for the jury, starting right here with "the story." A. (Reading.) "The story went a little something like this. He had—he had been at a party with a few friends, and he passed out, a male friend of his, who he named however I can't remember the name—"
>
> [Defense counsel]: Judge, I am going to object.
>
> [Prosecutor]: May we approach first?
>
> The Court: Sure.
>
> (Discussion was held off the record.)
>
> The Court: Go ahead, [Prosecutor].
>
> [Prosecutor]: I think were okay now. Start right here, "The story." Start it over.
>
> The Witness: The story that Don decided?
>
> Q. Right. A. (Reading.) "The story went a little something like this, he had been at a party with a few friends, and he passed out, a male friend of his, who he named, however, I can't remember the name, stuck his penis in Don's mouth, and then 'face fucked him.' (Exact term Don used) he then asked me if I wanted to make a little extra money . . . ."
>
> Q. Okay. So he asked you first whether you wanted to make some extra money, correct? A. Yes, sir.
>
> Q. Continue on. A. (Reading.) "— 'because I know you just got your car fixed and your mom covered the costs, it would help you pay her back.'"
>
> Q. Keep going. A. (Reading.) "and I then kinda cautiously asked how much money and for what? He then asked me if I would do the same thing his friend had done to him that night at the party, and asked how much I thought something like that should cost him. I said 100 dollars, and he thought about it for a while and said alright that would be okay and I said well how about 120 then and he said no that would not work, so I thought about it for a few moments and said I'm alright, I think I'm going to leave."
>
> Q. Okay. So the idea of you receiving money first came from the Defendant's suggestion, correct? A. Yes, sir.

The other two victims, L.C. and J.D., also testified at trial. Both alleged Zieman offered to pay them for sexual acts. L.C. stated he went to ask Zieman for a pay advance of $400 so he could put a deposit down on an apartment. Zieman asked L.C. if Zieman could "jack [L.C.] off." L.C. rejected the offer, and then Zieman asked if L.C. would "jack off" for Zieman. L.C. again rejected the offer and left. L.C. testified Zieman asked him to do the acts in return for the requested advance.

J.D. similarly testified that if he would ask for extra money, Zieman would tell him he would need to touch himself or allow Zieman to touch him to get it. The money offered would be between $125 and $300. Neither J.D. nor L.C. could remember the specific dates these incidents occurred, and both testified no money was actually exchanged or sex acts performed. Both also testified regarding the party that was held at Zieman's house. L.C. testified he hooked up the DVD player and was given a pornographic DVD to play. L.C. insisted the DVD came from Zieman's house, though no one really watched the video. J.D. said once he saw what was playing he did not pay attention to what was happening on the video.

After the court denied Zieman's motion for judgment of acquittal on all counts, Zieman offered the testimony of two other young men who had performed work for Zieman, one in 2002-2003 and one in 2006 and 2008. These witnesses denied ever being propositioned for sex or being shown obscene material by Zieman. The defense also called another witness who was at the party at Zieman's house with M.G., L.C., and J.D. This witness, who testified by

way of deposition, stated that L.C. and J.D. joked about bringing a pornographic DVD to the party. However, he never saw a DVD in their possession.

Following closing statements, the jury found Zieman guilty on all five counts. Zieman was sentenced to one-year incarceration on each of the two dissemination-of-obscene-material-to-a-minor convictions and two-years' incarceration on each of the three prostitution convictions. All but fifteen days on each sentence were suspended, and the court ordered the sentences be served consecutively for a total of seventy-five days in jail. Zieman was then placed on probation for two years, ordered to pay the applicable fines and surcharges, and ordered to obtain a sex-offender evaluation. He now appeals.

II. PRIOR ACTS EVIDENCE.

Zieman's first claim on appeal is that the district court erred when it admitted evidence regarding prior acts through M.G.'s testimony. Prior to trial Zieman submitted a motion in limine requesting evidence of other crimes, wrongs, or acts be excluded from trial, including "one certain allegation of activity in the State of Colorado which is undocumented and unsupported." The court granted the motion with the agreement of the State, who stated at the hearing, "[W]e will not bring any information in with regards to this, any event that occurred in Colorado." Zieman asserts that despite this agreement, the State introduced this evidence when it asked M.G. about "the story" Zieman told him. Zieman now contends the court erred in four ways when it permitted the State to introduce this evidence: (1) failing to require the State to "articulate a tenable noncharacter theory of logical relevance," (2) failing to rule why the Colorado evidence was now admissible after having sustained his motion in limine,

(3) admitting the evidence when it was not relevant to the crimes charged, and (4) admitting the evidence when the danger of unfair prejudice outweighed its probative value.

We review the admission of prior acts evidence for abuse of discretion. *State v*. *Taylor*, 689 N.W.2d 116, 124 (Iowa 2004). We give "much leeway to trial judges who must fairly weigh probative value against probable dangers." *Id.* Pursuant to Iowa Rule of Evidence 5.404(b),

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Prior bad acts are not admissible to show a defendant has a criminal disposition and thus is more likely to have committed the offense in question. *State v*. *Cox*, 781 N.W.2d 757, 760 (Iowa 2010). However, under the rule, prior bad acts are admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," and this list is not exclusive. *Id.* at 760–61. The issues we must analyze are (1) whether "the evidence is relevant to a *legitimate* issue in the case other than a general propensity to commit wrongful acts"; and (2) whether "the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice to the defendant." *Id.* at 761 (internal quotation marks and citations omitted).

Zieman's first two complaints regarding the admission of the evidence of the Colorado incident are the result of Zieman's own making. Zieman complains the court erred by (1) failing to require the State to "articulate a tenable noncharacter theory of logical relevance," (2) failing to rule why the Colorado

evidence was now admissible after having sustained his motion in limine. However, a review of the transcript indicates that it was not until M.G. began to read his full statement into the record that Zieman's counsel entered an objection, and the objection made was wholly lacking in any detail as to the error alleged— "Judge, I'm going to object." At that point the prosecutor asked to approach, and an off-the-record discussion was held. After the discussion was over, the court did not specifically rule on the objection but simply directed the prosecutor to proceed— "Go ahead." The prosecutor then stated to the witness, "I think we're okay now. Start right here, 'The story.' Start it over."

"When the admission or exclusion of evidence is challenged in the trial court our adversary system imposes the burden upon counsel to make a proper record to preserve error." *State v*. *Droste*, 232 N.W.2d 483, 487 (Iowa 1975). Zieman's counsel lodged only a general objection and failed to establish a record of the specific deficiency of which he complained. *See State v*. *Don*, 318 N.W.2d 801, 805 (Iowa 1982) (finding a general objection to the foundation for an exhibit was inadequate to preserve error on a chain-of-custody challenge). The off-the-record discussion may have disclosed the specific grounds complained of, as well as the court's ruling, as the witness was allowed to continue to read his statement. However, our record fails to disclose that discussion, and hence, we have no specifics as to the objection nor the reasoning behind the ruling. "If a party wants to appeal unreported remarks, that party needs to establish the record, including any objections made, through a bill of exceptions under Iowa Rule of Civil Procedure 1.1001 or a statement of evidence under Iowa Rule of Appellate Procedure [6.806]." *In re Marriage of Ricklefs*, 726 N.W.2d 359, 363

(Iowa 2007). Zieman has failed to provide us with any such record of the off-the-record discussion; therefore, Zieman's first two claims of error are denied as we are unable to assess the district court's exercise of discretion.

Zieman also asserts the court erred in admitting the evidence of the Colorado incident because it was not relevant to the crimes charged, and the danger of unfair prejudice outweighed its probative value. The first time "the story" was mention was on direct examination. The prosecutor asked M.G. what else happened that day, to which M.G. responded: "He at some point asked me if, well, he told me a story, and then he asked me if I would face fuck him, which was involved with the story that he had previously said."[1] No mention at this time was made other than it was "a story" which involved the sex act Zieman requested M.G. perform for money. This testimony was relevant to the charge of prostitution with respect to M.G. and was not unduly prejudicial.

The next mention of "the story" occurred during cross-examination. Zieman's attorney was challenging the claim that it was Zieman who requested a sex act from M.G. in exchange for money. Counsel attempted to use M.G.'s statement against him by claiming it was M.G. who offered to do a sex act for money, not Zieman who offered to pay M.G. for a sex act. M.G. responded, "you are twisting my words a little bit I think in there." Counsel had M.G. read two highlight phrases from the statement. M.G. complied but requested counsel also read the part of the statement in between the two highlighted phrases. Counsel agreed, but M.G. went on to state, "Maybe around it. I think there was parts you

[1] No objection was made by counsel to this testimony, though the State does not challenge error preservation, so we will address the merits.

got to skip over there 'cause we are not allowed to speak about it."[2] While Zieman asserts this was the second reference to the Colorado incident, we fail to see how it references the Colorado incident at all. M.G. was simply trying to make sure defense counsel did not reference the material that had been excluded from trial by the motion in limine. We find no prejudice from this testimony.

The final place Zieman asserts testimony regarding the Colorado incident was improperly admitted was on redirect examination. On redirect, the prosecutor had M.G. read the paragraph that contained the phrases defense counsel had introduced on cross-examination. The court had already stated during cross-examination that the prosecutor would have "an opportunity to address the remainder of the statement if he feels it is necessary." The introduction of the Colorado incident was only done to refute defense counsel's assertion that it was M.G. who sought money for sex, rather than Zieman who offered money for the sex act. The remainder of that portion of the statement showed that Zieman asked M.G. if he wanted to make extra money to pay off his car repair bills. M.G. asked how much money and for what. Zieman asked M.G. to perform the same sex act that Zieman's friend had previously performed, and then he asked M.G. how much that act would cost him. It was only then that M.G. proposed a dollar amount.

The doctrine of curative admissibility provides that "when one party introduces inadmissible evidence, with or without objection, the trial court has

[2] Zieman did not lodge an objection to this statement made by M.G., but the State once again does not challenge error preservation on appeal, so we will address it.

discretion to allow the adversary to offer otherwise inadmissible evidence on the same subject when it is fairly responsive." *State v*. *Williams*, 427 N.W.2d 469, 472 (Iowa 1988). When defense counsel had M.G. read from the otherwise inadmissible statement containing the Colorado incident, the trial court was within its discretion in permitting the State to clarify the misunderstanding defense counsel created by his selective use of the statement.

In addition under Iowa Rule of Evidence 5.106(a), "When [a] . . . writing, . . . or part thereof, is introduced by a party, any other part . . . is admissible when necessary in the interest of fairness, a clear understanding, or an adequate explanation." Defense counsel used part of the statement in cross-examination, and the rest of the paragraph from that statement was necessary in the interest of fairness, for a clear understanding of M.G.'s statement, and to provide an explanation as to why he would propose a dollar figure to Zieman. *See State v*. *Austin*, 585 N.W.2d 241, 243–44 (Iowa 1998). The two phrases introduced by defense counsel when taken out of context tended to mislead the jury as to who offered/requested money for the sex acts. The State was entitled to introduce the remaining parts of that statement to correct the misunderstanding. We find no abuse of discretion in the court's decision to permit M.G. to read the portion of the statement at issue.

III. INEFFECTIVE ASSISTANCE OF COUNSEL.

Zieman next alleges his trial counsel was ineffective in a number of ways, including: (1) failing to object to prosecutorial misconduct in the opening and closing statements when the prosecutor allegedly vouched for the credibility of the three complaining witnesses and requested the jury return a guilty verdict to

protect victims of crimes and the community, (2) failing to request a prior acts instruction that would address the Colorado incident; (3) failing to move for a mistrial when M.G. referenced the Colorado incident; and (4) failing to object to testimony from all three victims about the card party that occurred at Zieman's farm because this evidence did not form the basis of any of the charges.[3] The State asks us to preserve these claims for possible postconviction relief proceedings to permit trial counsel his day in court to explain his trial strategy.

To establish a claim of ineffective assistance of counsel, Zieman must prove counsel failed to perform an essential duty and this failure resulted in prejudice. *State v*. *Graves*, 668 N.W.2d 860, 869 (Iowa 2003). "Generally, ineffective-assistance claims are preserved for postconviction relief proceedings to afford the defendant an evidentiary hearing and thereby permit the development of a more complete record." *Id.* The postconviction relief proceeding also permits counsel an opportunity to explain his conduct. *State v*. *Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). "Strategic decisions made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable" but "trial strategies based on an investigation that is less than complete for the difficulty of the issues presented is susceptible to claims of ineffective assistance of counsel." *State v*. *Fountain*, 786 N.W.2d 260, 266 (Iowa 2010) (citation and internal quotation marks omitted) As we find the record on direct appeal lacking with respect to counsel's trial strategy, we preserve

[3] Zieman also raises ineffective-assistance-of-counsel claims in the event we found counsel failed to preserve error on the admission of the Colorado incident or failed to make a proper motion for judgment of acquittal. Those claims are addressed in other sections of this opinion and will not be repeated here.

Zieman's ineffective-assistance-of-counsel claims for possible postconviction relief proceedings.

IV. SUFFICIENCY OF THE EVIDENCE.

Zieman next challenges the sufficiency of the evidence to support each of the five convictions. With respect to the dissemination-of-obscene-material-to-a-minor convictions, Zieman asserts the evidence is inadequate to prove the material was obscene because the jury never viewed the videos that were allegedly shown to M.G. He also asserts, with respect to the first count, that there was no proof he "knowingly" disseminated the video. With respect to the prostitution convictions, Zieman challenges the credibility of each victim by pointing out their motivation for money, the contradictions in their testimony, and their memory problems. He asserts their testimony did nothing more than create mere speculation, suspicion, and conjecture. *See State v. McCullah*, 787 N.W.2d 90, 93 (Iowa 2010) ("Evidence which merely raises suspicion, speculation, or conjecture is insufficient.").

Our review of a challenge to the sufficiency of the evidence is for correction of errors at law. *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012). We need to "determine whether the evidence could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt." *State v. Canal*, 773 N.W.2d 528, 530 (Iowa 2009). We view all the evidence in the light most favorable to the verdict. *Id.*

A. Dissemination of Obscene Material. The jury was instructed in order to convict Zieman of dissemination of obscene material to a minor they needed to find:

> 1. Between the 18th day of April, 2010, and the 10th day of June, 2010, the defendant knowingly disseminated or exhibited obscene material to [M.G.].
> 2. [M.G.] was then under the age of eighteen.
> 3. The defendant was not the parent or guardian of [M.G.].

The jury was instructed that "knowingly" means "being aware of the character of the matter." In addition, "obscene material" was defined as,

> any material depicting or describing the genitals, sex acts, masturbation, excretory functions or sadomasochistic abuse which the average person, taking the material as a whole and applying contemporary community standards with respect to what is suitable material for minors, would find appeals to the prurient interests and is patently offensive; and the material, taken as a whole, lacks serious literary, scientific, political, or artistic value. Mere nudity does not constitute obscenity.
>
> Prurient interest is defined as a shameful or morbid interest in nudity, sex, or excretion.
>
> In determining the community standards, you are entitled to draw on your own knowledge of the views of the average person in the community or the vicinity from which you come to make your determination, within the parameters of the definitions you have been given.

Zieman was convicted of two counts of dissemination of obscene material to a minor. The first pertains to the incident where M.G. retrieved a box of VCR tapes from the outbuilding and played one of the tapes at Zieman's request, purportedly to make sure Zieman's VCR still worked. The other incident involved Zieman ordering a pay-per-view pornographic movie while M.G. was present. Zieman asserts both of these convictions are not supported by sufficient evidence because the jury was not shown the videos. Without seeing the videos, Zieman contends the jury would be unable to comply with the jury instruction to assess the material as a whole. We disagree.

In *State v*. *Keene*, our supreme court found a factual basis to support a guilty plea despite the fact that the actual video shown to the minors was not in

the record. 630 N.W.2d 579, 582 (Iowa 2001). The record contained only the description of the video by five minors. *Id.* The descriptions stated the video depicted "boys and girls engaged in sexual intercourse as well as girls engaged in sexual acts with other girls," including both vaginal intercourse and oral sex. *Id.* In addition, one minor described the video "as showing male genitalia penetrating a woman." *Id.* The supreme court found the description of the video sufficient to satisfy the definition of obscene material. *Id.* "[I]t was unnecessary for the court to independently view the material claimed to be obscene prior to accepting the plea of guilty when the record otherwise contained a sufficient description of the material." *Id.* "Obscene material can be described in words, just as it can be observed." *Id.* We find this rule applies also when the case is tried to a jury, rather than resolved on a guilty plea.

M.G. described the VCR video as showing "hard core porn" depicting "vaginal penetration between a man and a female." M.G. described the pay-per-view video as depicting "a collection of different females giving oral sex to guys." We find these descriptions sufficient for the jury to conclude the videos exhibited were obscene.

Zieman also asserts he did not "knowingly" exhibit the video, with respect to the first count, because he simply instructed M.G. to grab a video from the box to see if the VCR worked. M.G., not Zieman, chose the video to play, so Zieman asserts he could not have "knowingly" shown M.G. the obscene material.

The term "knowingly" is not defined in section 728.2, but it has been defined in our criminal case law to mean, "'merely a knowledge of the existence of the facts constituting the crime, or a knowledge of the essential facts and not

to require the knowledge of the unlawfulness of the act or omission'" *State v*. *Winders*, 366 N.W.2d 193, 195 (Iowa 1985) (citation omitted) (defining "knowingly" as it applied to the crime of possession of an offensive weapon); *see also State v*. *Knowles*, 602 N.W.2d 800, 801 (Iowa 1999) (defining "knowingly" as "with awareness" pursuant to Webster's Dictionary).

While Zieman may not have physically placed the tape in the VCR, he did instruct M.G. to do so. In addition, while M.G. "grabbed one off the top" of the box to test the machine, Zieman owned the video and watched the video with M.G., while eating popcorn during their break from work. He did nothing to stop the video from continuing to play. It was not until M.G. asked to return to work after feeling awkward watching the video with Zieman that the video was stopped. From this evidence, we find the jury could infer that Zieman knowingly exhibited obscene material to M.G. *State v*. *Schrier*, 300 N.W.2d 305, 306 (Iowa 1981) ("All legitimate inferences which may fairly and reasonably be deduced [from the evidence] will be accepted.").

B. Prostitution. Next, Zieman challenges the sufficiency of the evidence supporting his conviction to three counts of prostitution. He contends that the victims' testimonies were mere speculation, suspicion, and conjecture and, therefore, cannot support his conviction. He points out that none of the victims could remember the dates the incidents occurred, each had requested a monetary advance from him, and each contradicted some aspect of the incidents with each other. All of these challenges attack the credibility of the victims.

When reviewing a sufficiency-of-the-evidence claim, we do not venture into an evaluation of a witness's credibility. *State v*. *Smith*, 508 N.W.2d 101, 102

(Iowa Ct. App. 1993). It is for the jury to determine credibility. *Id.* However, an exception to this rule exists if the testimony is "'so impossible and absurd and self-contradictory that it should be deemed a nullity by the court.'" *Id.* at 103 (quoting *Graham v*. *Chi. & Nw*. *Ry*. *Co*., 119 N.W. 708, 711 (Iowa 1909)). Unlike the testimony in *Smith*, we find the testimony of M.G., J.D., and L.C. not so impossible, absurd, or self-contradictory that it should be deemed a nullity. It is true the victims could not remember the specific dates each of the incidents occurred, but their description of the incidents remained consistent. We reject Zieman's sufficiency claims.

V. SEVERANCE.

Finally, Zieman asserts the district court erred in denying his motion to sever the charges against him. We review the court's ruling on a motion to sever for an abuse of discretion. *State v*. *Leutfaimany*, 585 N.W.2d 200, 203 (Iowa 1998). We will not find an abuse of discretion unless a defendant demonstrates that a joint trial prejudiced his rights to a fair trial. *State v*. *Clark*, 464 N.W.2d 861, 864 (Iowa 1991).

Iowa Rule of Criminal Procedure 2.6(1) provides:

> Two or more indictable public offenses which arise from the same transaction or occurrence or from two or more transactions or occurrences constituting parts of the common scheme or plan, when alleged and prosecuted contemporaneously, shall be alleged and prosecuted as separate counts in a single complaint, information or indictment, unless, and for good cause shown, the trial court in its discretion determines otherwise.

When determining whether transactions or occurrences are part of a "common scheme or plan," we look to see whether they are the "products of a single or continuing motive." *State v*. *Elston*, 735 N.W.2d 196, 198 (Iowa 2007). We

consider factors such as "intent, modus operandi, and the temporal and geographic proximity of the crimes." *Id.* at 199. "To prove the district court abused its discretion in refusing to sever charges, [the defendant] bears the burden of showing prejudice resulting from joinder outweighed the State's interest in judicial economy." *Id.*

In rejecting Zieman's pretrial motion to sever, the court stated:

> The offenses are alleged to have occurred during a range of time covering, at most, four consecutive months. In addition to this temporal proximity, the offenses also satisfy the geographic proximity requirement. They are all alleged to have occurred on the Defendant's farm near Royal or his home in Spencer.
>
> The anticipated testimony set forth in the Minutes also shows that the Defendant's alleged modus operandi and intent establish that the offenses are products of a single or continuing motive. Each of the three alleged victims was hired to do certain work for the Defendant on his farm near Royal (and on at least one occasion at his home in Spencer). The three alleged victims were all of the same approximate age of 18 years. All three were young men. Each alleges he was eventually propositioned by the Defendant to perform some sort of sex act for money. The allegations of dissemination of obscene material are inextricably intertwined with the charges of prostitution and are part of the same motive or intent. All five of the charges, if proven, could be found to have been motivated by the Defendant's desire to have some sort of sexual relations with young men for payment. . . .
>
> The court also concludes Defendant will not be unfairly prejudiced by a joint trial of these charges. In addition to the above considerations, the court anticipates the jury will be properly instructed to consider the Defendant's guilt or innocence on each count separately.

While the evidence at trial demonstrated the crimes occurred over a six-month time period rather than four months, as originally indicated by the district court, this minor change did not prejudice Zieman's fair-trial rights. The evidence at trial continued to show a common modus operandi and intent with respect to the prostitution charges, and the dissemination charges were inextricably

intertwined with the charge of prostitution as it pertained to M.G. *See id.* (finding no abuse of discretion when the trial court refused to sever the charges as all of the crimes could be found to have been motivated by the defendant's desire to satisfy his sexual desires through the victimization of children, they all occurred in the defendant's home, but they did not have temporal proximity). We find no abuse of discretion in the district court's reasoning.

VI. CONCLUSION.

We affirm Zieman's conviction as we conclude the district court did not abused its discretion in permitting the introduction of prior acts evidence or in refusing to sever the charges. Sufficient evidence supports his conviction. However, as the record is inadequate on direct appeal, we preserve Zieman's ineffective-assistance-of-counsel claims for possible postconviction relief proceedings.

AFFIRMED.

Doyle, J., concurs; Potterfield, J., dissents in part.

POTTERFIELD, J. (dissenting in part)

I respectfully dissent from the majority's opinion on the issue of sufficient evidence to support the two convictions for dissemination of obscene material. I otherwise agree with the well-reasoned findings of the majority.

As to the dissemination of obscene material, Zieman was charged and convicted of showing two recordings to then seventeen-year old M.G. on two separate occasions. The State neither offered nor admitted either recording into evidence. As the majority noted, the court instructed the jury on their obligation to determine whether either recording was obscene under the law, using the following definition:

> [A]ny material depicting or describing the genitals, sex acts, masturbation, excretory functions or sadomasochistic abuse which the average person, taking the material as a whole and applying contemporary community standards with respect to what is suitable material for minors, would find appeals to the prurient interests and is patently offensive; and the material, taken as a whole, lacks serious literary, scientific, political, or artistic value. Mere nudity does not constitute obscenity.
>
> Prurient interest is defined as a shameful or morbid interest in nudity, sex, or excretion.
>
> In determining the community standards, you are entitled to draw on your own knowledge of the views of the average person in the community or the vicinity from which you come to make your determination, within the parameters of the definitions you have been given.

Without viewing the recordings, I would hold the jury was unable to determine community standards of obscenity based on the descriptions of the recordings to which M.G. testified.

The majority's reliance on *State v*. *Keene* is misplaced. 630 N.W.2d at 582. *Keene* involves the sufficiency of the record for purposes of determining whether a factual basis exists to support a guilty plea. *Id.* In that case, the court

considered the minutes of testimony which "included the testimony, of the five minors who detailed sex acts depicted in the video," and determined "the descriptions of the video provided in the minutes of testimony [were] sufficient to satisfy the definition of obscene material." *Id.* But the standard for the sufficiency of the record for a guilty plea is not enough for a jury verdict. Our supreme court has described the evidentiary thresholds required for accepting guilty pleas, saying "the record does not need to show the totality of evidence necessary to support a guilty conviction, but it need only demonstrate facts that support the offense." *State v. Ortiz*, 789 N.W.2d 761, 768 (Iowa 2010). The holding in *Keene* does not answer the question here, *where the issue is* sufficiency of the evidence to support a guilty verdict beyond a reasonable doubt.

> [T]he obscenity test as to minors is different from the test as to adults. . . . However, minors are still "entitled to a significant measure of First Amendment protection and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." . . . "[A]ll nudity cannot be deemed obscene even as to minors."

State v. Canal, 773 N.W.2d 528, 531 (Iowa 2009) (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975)). The question is, therefore, "whether the evidence in this record was sufficient for this jury to determine, under its own community standards, that the material [displayed to M.G. by Zieman] was obscene." *Id.* at 532. I would find the evidence insufficient to make such a determination.

The State points to an earlier Iowa Court of Appeals unpublished opinion, in which a panel of our court held, based on *Keene*, that testimony describing a photograph of a penis sent to a minor's cell phone was sufficient evidence to

support a guilty verdict on a dissemination of obscene material charge. *State v*. *Chamberlin*, No. 11-1077 2012 WL 3195911, at *1 (Iowa Ct. App. Aug. 8, 2012). Our court rejected Chamberlin's argument that the "depiction of a non-erect penis presented into evidence solely through testimony of lay witnesses cannot be obscene material." *Id.* at *2. (internal quotation marks omitted). We noted descriptions of the pictures were given by more than one witness, that the photographs had been deleted from the phones, and that the jury's finding of obscenity was "bolstered by the context in which the pictures were sent." *Id.* at *3. (noting the photographs were transmitted during "sexually-charged texting conversations with the minor"). The obscene material in *Chamberlin* was a single photograph of a penis on a cell phone. *Id.* The jury did not need to see the single photograph to evaluate its content.

Here, in contrast, Zieman displayed two films in M.G.'s presence; M.G 's descriptions were the only evidence the jury was provided to make its evaluation. M.G. described the VCR video as "at first it was like a sex ed video . . . and then it cut into like a hard core porn video . . . [depicting] vaginal penetration between a man and a female." M.G. described the pay-per-view video as depicting "a collection of different females giving oral sex to guys." Neither description gave the jury information to use to evaluate "the material taken as a whole" as our jury instruction requires.

Justice Stewart described the inherent difficulty of defining obscenity in his famous concurrence in *Jacobellis v*. *Ohio*:

> I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since *Roth* and *Alberts*, that under the First and Fourteenth Amendments criminal

> laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

378 U.S. 184, 197 (1964) (referencing *Roth v*. *U*.*S*. and *Alberts v*. *California*, 354 U.S. 476 (1957)). The jury in this case did not see the videos, and could not have determined from the descriptions of intercourse and oral sex that they were obscene. The definition of obscenity requires the jury to consider the material as a whole and as an "average person" and to make a determination regarding community standards. The conclusory testimony of this one witness did not satisfy the State's burden of proof.

Zieman preserved this issue in his motions for directed verdict. Under the instructions given, the jury was required to apply its own community standards to determine that the material "appealed to the prurient interest, was patently offensive, and lacked serious literary, scientific, political, or artistic value." *See also Canal*, 773 N.W.2d at 533. The descriptions here were insufficient for that purpose.