

**IN THE COURT OF APPEALS OF IOWA**

No. 8-324 / 07-1051

Filed May 14, 2008

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**JORGE CANAL, JR.,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Dallas County, Virginia Cobb,  
Judge.

Defendant appeals his conviction for disseminating obscene material to a  
minor. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson,  
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant  
Attorney General, Wayne Reisetter, County Attorney, and Sarah Pettinger,  
Assistant County Attorney, for appellee.

Considered by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

**EISENHAUER, J.**

After a jury trial, Jorge Canal Jr. was found guilty of dissemination and exhibition of obscene material to a minor in violation of Iowa Code section 728.2 (2005).<sup>1</sup> On appeal he argues the photograph sent to the minor was not obscene and argues his counsel was ineffective. We affirm.

Canal sent three pictures to a fourteen-year-old girl's e-mail from his cell phone. One picture included a close-up photograph of his erect penis. Additionally, one e-mail included the message header, "I Love You." Canal argues the evidence was insufficient to support his conviction because the photograph was nudity depicting a normal biological occurrence and is not obscene.<sup>2</sup>

We review challenges to the sufficiency of the evidence supporting a guilty verdict for correction of errors at law. *State v. Bash*, 670 N.W.2d 135, 137 (Iowa 2003). We will uphold a verdict if substantial record evidence supports it. Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *Id.* We review the evidence in the light most favorable to the State. *Id.*

Iowa regulates obscene materials "on the basis they are unsuitable for minors." *State v. Robinson*, 618 N.W.2d 306, 316 (Iowa 2000). Because the State has an interest in preventing the distribution of objectionable material to children, the concept of obscenity varies according to whether the material is

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<sup>1</sup> Canal was originally granted a deferred judgment. The court revoked the deferred judgment and entered sentence after Canal violated the terms of his probation.

<sup>2</sup> Canal's reliance on *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975) is misplaced. The *Erznoznik* court was analyzing a city ordinance and the city admitted the ordinance went far beyond the permissible restraints on obscenity. *Id.* at 208, 95 S. Ct. at 2272, 45 L. Ed. 2d at 130.

directed towards adults or towards children. *Ginsberg v. New York*, 390 U.S. 629, 636, 88 S. Ct. 1274, 1278-79, 20 L. Ed. 2d 195, 202 (1968). Obscene material is defined in Iowa Code section 728.1(5):

“*Obscene material*” is any material depicting . . . the genitals . . . 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 interest and is patently offensive; and the material, taken as a whole, lacks serious literary, scientific, political or artistic value.

This statutory language was incorporated into jury instruction number eighteen, which also explained: “The definition of obscenity includes the term ‘prurient interest.’ Prurient interest is defined as shameful or morbid interest in nudity, sex, or excretion.”

There is no requirement the prosecution offer expert testimony concerning the obscenity of the material “when the allegedly obscene material itself is placed in evidence.” *State v. Groetken*, 479 N.W.2d 298, 301 (Iowa 1991). The jurors, as the factfinders, determine the factual “issues of contemporary community standards for appeal to the prurient interest and patent offensiveness.” *Id.* The term “contemporary community standards” is the yardstick the jury uses to “evaluate the material.” *Id.* at 303. Further, courts have determined “lewd exhibitions of the genitals” can be patently offensive. *Miller v. California*, 413 U.S. 15, 25, 93 S. Ct. 2607, 2615, 37 L. Ed. 2d 419, 431 (1973).

When viewing the evidence in the light most favorable to the State, we conclude there is substantial evidence in the record to support the jury’s verdict. While Canal’s attorney argued the photograph only indicated a “natural interest in sex” as opposed to a “shameful or morbid” interest, the jury was not persuaded. The jury, using contemporary community standards, could conclude the picture

of Canal's erect penis, shot in a close-up view and accompanied by an "I Love You" message, was not suitable material for a minor, was patently offensive, and appealed to a shameful or morbid interest in nudity or sex. We therefore uphold the jury's verdict.

Canal also argues his trial counsel was ineffective because the jury was not properly instructed on the applicable law when his trial counsel failed to request an instruction stating mere nudity did not constitute obscenity. We normally preserve ineffective-assistance-of-counsel claims for postconviction relief proceedings, however, direct appeal is appropriate when the record is adequate to determine as a matter of law the defendant will be unable to establish one or both of the elements of his ineffective-assistance claims. *State v. Reynolds*, 670 N.W.2d 405, 411 (Iowa 2003). Here the record is adequate to resolve this issue on direct appeal.

In order to prevail, Canal must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. See *State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). We conclude Canal has not proven his counsel failed to perform an essential duty because the jury was properly instructed on the applicable law.

The jury instruction did not allow mere nudity to be considered obscene as Canal suggests. If that were the case, the instruction would have ended after its statement "any material depicting the genitals." Instead, in addition to "material depicting the genitals," the jury was instructed to use contemporary community standards to evaluate the suitability of the photograph for a minor and to consider three factors: (1) whether the photograph appeals to a shameful or morbid

interest in nudity or sex; (2) whether the photograph is patently offensive; and (3) whether the photograph has any literary/scientific/political/artistic value. The jury was properly instructed on the fact finding needed to determine whether the photograph was obscene. “It is well settled that a trial court need not instruct in a particular way so long as the subject of the applicable law is correctly covered when all the instructions are read together.” *State v. Uthe*, 542 N.W.2d 810, 815 (Iowa 1996). Because the jury instructions correctly covered the applicable law, Canal’s attorney had no duty to request an additional instruction. Canal has failed to prove breach of an essential duty, therefore, his ineffective assistance of counsel claim fails.

**AFFIRMED.**