NUMBER 13-15-00576-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

GREGG BARTHELMAN, Appellant,

v.

THE STATE OF TEXAS, Appellee.

On appeal from the 206th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Benavides, and Perkes
Memorandum Opinion by Justice Benavides

A Hidalgo County grand jury indicted appellant Gregg Barthelman for one count of possession with the intent to promote child pornography ("the promotion count"), a second-degree felony, *see* TEX. PENAL CODE ANN. § 43.26(e) (West, Westlaw through 2015 R.S.), and fourteen other counts of possession of child pornography ("the possession counts"), each third-degree felonies. *See id.* § 43.26(a). Barthelman

pleaded not guilty to all of the charges, but a jury later convicted him of all counts and assessed punishment at twenty years' imprisonment for the promotion count and two years' imprisonment for each of the fourteen possession counts. The trial court ordered that the sentences for all of the counts run consecutively.

By eight issues, which we construe as six, Barthelman asserts that: (1) the evidence is insufficient to support the jury's verdict; (2) the trial court reversibly erred by admitting various pieces of inadmissible evidence; (3) the trial court reversibly erred by ordering Barthelman's sentences to run consecutively; (4) the trial court reversibly erred by failing to give an instruction on reasonable doubt; (5) Barthelman was denied ineffective assistance of counsel at trial; and (6) several counts in the indictment were barred by double jeopardy. We affirm.

I. BACKGROUND

Barthelman, a retired teacher, leased a self-storage unit from the Best Little Warehouse in Texas located in Edinburg. Pursuant to this lease agreement, Barthelman paid the storage facility monthly rent in order to lease the unit. In April of 2012, Barthelman had defaulted on several monthly rent payments and was given the option of paying the past-due rental charges or have the contents that were stored in the unit sold at public auction. *See generally* TEX. PROP. CODE ANN. §§ 59.001–.047 (West, Westlaw through 2015 R.S.) (Self-Service Storage Facility Liens). After receiving no response from Barthelman, employees of the facility proceeded forward with the public sale of the contents of Barthelman's storage unit, known as Unit Number 76.

At the public sale, Roland Villarreal purchased the contents of the unit because "things [inside of it] . . . caught [his] attention"; things that he could later resell in a yard

sale. After the purchase, Villarreal was tasked with cleaning out the storage unit within forty-eight hours. After loading all of the contents from the storage unit into his vehicle, Villarreal took the items to his home and sorted through them. Once at home, Villarreal discovered various photographs of nude children located on "probably five or six" cameras purchased from Barthelman's storage unit. Upon making this discovery, Villarreal called the Edinburg Police Department to report what he found.

Officer Jose Lara first responded to Villarreal's call. Upon arriving at Villarreal's residence, Officer Lara reviewed two nude photos of "a naked young man, not more than . . . 12 years old" and referred the case to the criminal investigation department of the Edinburg Police Department. Edinburg police investigators processed various items found at Villarreal's home, including SD cards containing photographs and other miscellaneous items such as mail, bank statements, and retirement paperwork all in Barthelman's name. After examining the relevant evidence recovered, police focused their investigation on Barthelman.

Edinburg police, with the assistance of the Federal Bureau of Investigation, conducted an in-depth analysis of various electronic storage devices, including an SD card and a USB drive. In this examination of evidence, police uncovered thousands of images of male and female children posing nude. The FBI sent these images to the National Center for Missing and Exploited Children (NCMEC) to analyze the images with their database of photos. According to FBI Special Agent Brian Hamilton, the NCMEC confirmed four known victims of child pornography in the images it analyzed for the FBI.

After a three-day trial, jurors found Barthelman guilty as charged and sentenced him to twenty years' imprisonment with the Texas Department of Criminal Justice—

Institutional Division (TDCJ-ID) for count one, and two years' imprisonment with TDCJ-ID for each subsequent count (counts two through fifteen). This appeal followed.

II. SUFFICIENCY CHALLENGE

By his first issue, Barthelman asserts that the evidence was insufficient to support the jury's verdict of guilty on all fifteen counts.

A. Standard of Review and Applicable Law

In reviewing sufficiency of evidence to support a conviction, we consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Winfrey v. State*, 393 S.W.3d 763, 768 (Tex. Crim. App. 2013); *Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011) (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979)); *see Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality op.). In viewing the evidence in the light most favorable to the verdict, we defer to the jury's credibility and weight determinations because the jury is the sole judge of the witnesses' credibility and the weight to be given to their testimony. *Brooks*, 323 S.W.3d at 899. It is unnecessary for every fact to point directly and independently to the guilt of the accused; it is enough if the finding of guilty is warranted by the cumulative force of all incriminating evidence. *Winfrey*, 393 S.W.3d at 768.

The elements of the offense are measured as defined by a hypothetically correct jury charge. *Villarreal v. State*, 286 S.W.3d 321, 327 (Tex. Crim. App. 2009) (citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). Such a charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily

increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Id*. Under a hypothetically correct jury charge in this case, Barthelman is guilty of possession with the intent to promote child pornography if he knowingly or intentionally possessed with intent to promote material that visually depicts a child younger than eighteen years of age at the time the image of the child was made who is engaging in sexual conduct, including a child who engages in sexual conduct as a victim of an offense under Section 20A.02(a)(5), (6), (7), or (8) of the penal code; and the person knows that the material depicts the child engaging in sexual conduct, including a child who engages in sexual conduct as a victim of an offense under Section 20A.02(a)(5), (6), (7), or (8) of the penal code. *See* TEX. PENAL CODE ANN. § 43.26(e)(1). Barthelman is guilty of possession of child pornography if he knowingly or intentionally possessed, or knowingly or intentionally accessed with intent to view, visual material that visually depicts a child younger than eighteen years of age at the time the image of the child was made who is engaging in sexual conduct, including a child who engages in sexual conduct as a victim of an offense under Section 20A.02(a)(5), (6), (7), or (8) of the penal code; and (2) Barthelman knew that the material depicts the child as described. *See id.* § 43.26(a). Section 43.25 defines "sexual conduct" as sexual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola. *See id.* § 43.25(a)(2) (West, Westlaw through 2015 R.S.).

B. Discussion

In his sufficiency challenge, Barthelman makes three general arguments, applicable to all counts: (1) the evidence is insufficient to show that the children depicted in the photographs and videos were under the age of eighteen; (2) this Court's independent review of the images in this case would show that they are not child pornography; and (3) no evidence supports the element that Barthelman "specifically knew or viewed the exhibits alleged to be child pornography contained in the indictment."

Here, the jury was given the opportunity to review the following evidence on each count, with general descriptions of each exhibit:

- Count One: State's Exhibit 33, a collection of DVDs and State's exhibit 31, a USB drive containing among other images, photos of a male exposing his genitals for the camera;
- Count Two: State's Exhibit 45, a female posing in her underwear without a top;
- Count Three: State's Exhibit 41, a fully-nude male;
- Count Four: State's Exhibit 37, a fully-nude male;
- Count Five: State's Exhibit 38, a fully-nude male;
- Count Six: State's Exhibit 39, a fully-nude male;
- Count Seven: State's Exhibit 40, a fully-nude male;
- Count Eight: State's Exhibit 35, a fully-nude female;
- Count Nine: State's Exhibit 36, a fully-nude female;
- Count Ten: State's Exhibit 46, a fully-nude male in the shower;

- Count Eleven: State's Exhibit 30, a video of several males masturbating;
- Count Twelve: State's Exhibit 30, a video of males exposing their genitals and engaging in sexual intercourse;
- Count Thirteen: State's Exhibit 30, a video of a male masturbating;
- Count Fourteen: State's Exhibit 30, a video of a male masturbating;
- Count Fifteen: State's Exhibit 30, a video of a male exposing his genitals and masturbating.

1. Age of the Subjects of the Photos and Videos

First, when it becomes necessary for the purposes of penal code section 43.26 to determine whether a child who participated in sexual conduct was younger than eighteen years of age, as Barthelman is arguing in this issue, the court or jury may make this determination by any of the following methods: (1) personal inspection of the child; (2) inspection of the photograph or motion picture that shows the child engaging in the sexual performance; (3) oral testimony by a witness to the sexual performance as to the age of the child based on the child's appearance at the time; (4) expert medical testimony based on the appearance of the child engaging in the sexual performance; or (5) any other method authorized by law or by the rules of evidence at common law. TEX. PEN. CODE ANN. § 43.25(g) (West, Westlaw through 2015 R.S.). As noted above, the jury inspected all of the exhibits that the State used to support each count, as did this Court. Considering this evidence in the light most favorable to the verdict, we determine that based on the evidence and the reasonable inferences therefrom, a rational fact finder could have found that all of the individuals depicted in these photographs and videos were

under the age of eighteen at the time the image or video was made.

2. Were these exhibits child pornography?

In order for an image to constitute child pornography, the child depicting in the photograph or video must be engaged in sexual conduct. *See id.* § 43.26(a). As noted, "sexual conduct" includes a variety of behaviors including sexual contacts, sexual intercourse, or lewd exhibition of the genitals, anus, or any portion of the female breast, below the top of the areola. *See id.* § 43.25(a)(2). "Lewd" or the phrase "lewd exhibition of the genitals" has not been statutorily defined, and are thus given their common, ordinary, or usual meaning. *Roise v. State*, 7 S.W.3d 225, 242 (Tex. App.—Austin 1999, pet. ref'd). Therefore, jurors are presumed to know and apply such common and ordinary meanings. *Id.* Nevertheless, this Court has recently adopted the six-factor *Dost* test to assist in determining whether a particular image rises to the level of "lewd" exhibition. *See Bolles v. State*, __ S.W.3d __, 2016 WL 3548797, at *4 (Tex. App.—Corpus Christi June 23, 2016, pet. filed) (citing *United States v. Dost*, 636 F.Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987), *and aff'd* 813 F.2d 1231 (9th Cir. 1987). The *Dost* factors include: 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; 2) whether the setting of the visual depiction is sexually suggestive, i.e. in a place or pose generally associated with sexual activity; 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; 4) whether the child is fully or partially clothed, or nude; 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. *Bolles*, __ S.W.3d at __, 2016 WL

3548797, at *4.

a. Count One

State's Exhibit 31 contains several images of a fully-nude young boy standing up inside of a living room using a laptop. Furthermore, there are other images included in this exhibit of the same boy bathing and posing for photographs with his legs spread open on his couch. Finally, this exhibit also contains a collection of photographs that focus exclusively on the boy's genitals. After viewing these images and weighing the *Dost* factors, we conclude that a rational juror could have found that the subject in State's Exhibit 31 was engaged in sexual conduct. *See* TEX. PENAL CODE ANN. § 43.26(a).

b. Count Two

State's Exhibit 45 depicts a young girl exposing her breasts, while wearing only panties, and lying on a bed while propped up by pillows. Her pose is sexually suggestive and in a manner associated with sexual activity. After viewing this image and weighing the *Dost* factors, we conclude that a rational juror could have found that this subject in State's Exhibit 45 was engaged in sexual conduct. *See id.*

c. Count Three

State's Exhibit 41 depicts a boy with his genitals exposed and his legs spread. After viewing this image and weighing the *Dost* factors, we conclude that a rational juror could have found that this subject in State's Exhibit 41 was engaged in sexual conduct. *See id.*

d. Count Four

State's Exhibit 37 depicts a fully-nude boy propped up by pillows sitting on his couch, biting his finger, and exposing his genitals. After viewing this image and weighing

the *Dost* factors, we conclude that a rational juror could have found that this subject in State's Exhibit 37 was engaged in sexual conduct. *See id.*

e. Count Five

State's Exhibit 38 depicts a fully-nude boy sitting on a tile floor with his legs spread open and his genitals exposed. After viewing this image and weighing the *Dost* factors, we conclude that a rational juror could have found that this subject in State's Exhibit 38 was engaged in sexual conduct. *See id.*

f. Count Six

State's Exhibit 39 depicts a fully-nude boy lying down on a tile floor, with his arms and legs fully stretched out and with his genitals exposed. After viewing this image and weighing the *Dost* factors, we conclude that a rational juror could have found that this subject in State's Exhibit 39 was engaged in sexual conduct. *See id.*

g. Count Seven

State's Exhibit 40 depicts a fully-nude boy sitting on his hands on a chair, with his legs slightly spread open, exposing his genitals. After viewing this image and weighing the *Dost* factors, we conclude that a rational juror could have found that this subject in State's Exhibit 40 was engaged in sexual conduct. *See id.*

h. Count Eight

State's Exhibit 35 depicts a fully-nude girl standing up with her arms behind her head, posing in a sexually suggestive position. After viewing this image and weighing the *Dost* factors, we conclude that a rational juror could have found that this subject in State's Exhibit 35 was engaged in sexual conduct. *See id.*

i. Count Nine

State's Exhibit 36 depicts a fully-nude girl standing up, posing for the camera draping a lace wrap across her shoulders. After viewing this image and weighing the *Dost* factors, we conclude that a rational juror could have found that this subject in State's Exhibit 36 was engaged in sexual conduct. *See id.*

j. Count Ten

State's Exhibit 46 depicts the genitals of a young boy in a shower. The image solely focuses on the boy's genitals and does not show the individual's face or upper torso. After viewing this image and weighing the *Dost* factors, we conclude that a rational juror could have found that this subject in State's Exhibit 46 was engaged in sexual conduct. *See id.*

k. Counts Eleven, Twelve, Thirteen, Fourteen, and Fifteen

State's Exhibit 31, used to support counts eleven, twelve, thirteen, fourteen, and fifteen indisputably contain video images in which the subjects are engaged in sexual conduct, including actual sexual intercourse or masturbation. Accordingly, the evidence is legally sufficient to support the jury's verdict that these exhibits amounted to child pornography. *See id.* § 43.26(a).

3. Evidence that Barthelman knew or viewed the exhibits

Finally, although Barthelman asserts that "there was no evidence presented establishing that [Barthelman] specifically knew or viewed the exhibits alleged to be child pornography contained in the indictment," Barthelman fails to properly and fully brief this issue before this Court. Rule 38.1(i) of the Texas Rules of Appellate Procedure requires an appellant's brief to contain a clear and concise argument for the contentions made,

with appropriate citations to the record. *See* TEX. R. APP. P. 38.1(i). Barthelman's brief fails to meet the mandates of this rule. Accordingly, we will not address this argument further. *See* TEX. R. APP. P. 47.1.

4. Summary

After viewing all of the evidence in the light most favorable to the verdict, we hold that the evidence is sufficient to support Barthelman's convictions for the promotion count and the possession counts beyond a reasonable doubt. *See Winfrey*, 393 S.W.3d at 768. We overrule Barthelman's first issue.

III. ADMISSIBILITY OF EVIDENCE

By his second, third, and fourth issues Barthelman asserts that the trial court erroneously admitted various pieces of evidence.

A. Standard of Review

A trial court's decision on whether to admit evidence is reviewed under an abuse of discretion standard and will not be reversed if it is within the zone of reasonable disagreement. *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011). An abuse of discretion occurs when the trial court acts arbitrarily or unreasonably, without reference to guiding rules or principles. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990) (en banc). The inquiry on appeal is whether the result was reached in an arbitrary or capricious manner. *Id.* We afford trial courts "great discretion" in its evidentiary decisions because "the trial court judge is in a superior position to evaluate the impact of the evidence." *Id.* at 378–79.

B. Discussion

1. Extraneous Offense Evidence during Guilt-Innocence

In his second issue, Barthelman generally argues that "numerous items were discussed and/or introduced into evidence," including pornographic images and discussions about Barthelman's emails and "preferences to young boys in his emails." To preserve an error for appellate review, a party must have presented the trial court with a timely request, objection, or motion stating specific grounds for the desired ruling. *See* TEX. R. APP. P. 33.1(a). The State points out—and Barthelman likewise concedes in his brief—that he failed to object to the admissibility of these various pieces of evidence now complained about on appeal. As a result, we find that this issue is not properly preserved for our review and therefore waived. *See id.* We overrule Barthelman's second issue.

2. Tony Schmidt's Testimony during Punishment

In his third issue, Barthelman argues that testimony of Tony Schmidt, the State's only witness during the punishment phase of trial, was improperly admitted and resulted in harm. The State counters that Schmidt's testimony was properly admitted as a victim impact statement. We disagree with the State.

Schmidt testified to matters that he allegedly witnessed while he was a scuba-diving camp attendee back in the early 1980s. Specifically, Schmidt testified to witnessing Barthelman photographing minors being sexually assaulted at the camp while he was an attendee. Victim impact evidence is designed to show the victim's "uniqueness as a human being" and "the state has legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the [defendant] should be considered as an individual, so too the victim is an

individual . . . .” whose status as a victim may have affected society and the victim’s family. *Cantu v. State*, 939 S.W.2d 627, 637 (Tex. Crim. App. 1997) (en banc) (citing *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)). The record does not show that any of Schmidt’s testimony related to any of the photographs or videos that were the basis for the current case against Barthelman. As such, this amounted to inadmissible extraneous victim impact evidence that was irrelevant and prejudicial. *See id.* (“The danger of unfair prejudice to a defendant inherent in the introduction of “victim impact” evidence with respect to a victim not named in the indictment on which he is being tried is unacceptably high. The admission of such evidence would open the door to admission of victim impact evidence arising from *any* extraneous offense committed by a defendant. Extraneous victim impact evidence, if anything, is more prejudicial than the non-extraneous victim impact evidence found by this Court to be inadmissible . . . .” (Emphasis in original)).

Having found error, we must now analyze for non-constitutional harm. *See* TEX. R. APP. P. 44.2(b) (“Any other [non-constitutional] error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”). Schmidt was the State’s only punishment-phase witness, while Barthelman called three different witnesses to testify as to Barthelman’s character and whether he was known to possess child pornography. During closing arguments, both sides briefly mentioned Schmidt’s testimony, but more focus was placed on Schmidt’s testimony by Barthelman’s counsel rather than the State’s prosecutor. Finally, we note that the jury sentenced Barthelman to the statutory minimum for fourteen of the fifteen total counts. Having reviewed these factors, we hold that the erroneous admission of Schmidt’s testimony was harmless because it did not affect Barthelman’s substantial rights. We overrule Barthelman’s third

issue.

3. Seizure Concerns

By his fourth issue, Barthelman challenges the admissibility of the contents of Barthelman's storage unit because they were seized by police without a warrant in violation of the United States and Texas Constitutions. The admissibility of evidence that Barthelman now complains about on appeal were expressly and affirmatively not objected to at trial. A party must properly preserve error to complain on appeal regarding the admissibility of evidence, even on constitutional grounds. *See* TEX. R. APP. P. 33.1(a); *see also Smith v. State*, __S.W.3d__, __, 2016 WL 3193479, at **4–5 (Tex. Crim. App. June 8, 2016). Because Barthelman failed to preserve error, we hold that this issue is waived. Barthelman's fourth issue is overruled.

IV. REASONABLE DOUBT INSTRUCTION

By his fifth issue, Barthelman asserts that the trial court reversibly erred by failing to give the jury a reasonable doubt instruction during the punishment phase of trial.

A. Standard of Review

Our first duty in analyzing a jury-charge issue is to determine whether error exists. *See Ngo v. State,* 175 S.W.3d 738, 743 (Tex. Crim. App. 2005) (en banc). If we find error, we analyze it for harm. *Id.* The degree of harm necessary for reversal depends on whether the error was preserved by requesting the proposed jury instruction. *See Oursbourn v. State*, 259 S.W.3d 159, 168–69 (Tex. Crim. App. 2008) ("[T]he defense must request a jury instruction before any error can result."). If the error was preserved by objection, we will reverse if we find "some harm" to the defendant's rights. "Some harm" means any harm, regardless of degree. *Arline v. State*, 721 S.W.2d 348, 351

(Tex. Crim. App. 1986) (en banc); *see Atkinson v. State*, 934 S.W.2d 896, 897 (Tex. App.—Fort Worth 1996, no pet.). Under a "some-harm" analysis, we are obligated to determine whether the error was "calculated to injure the rights of the defendant." *See Arline*, 721 S.W.2d at 352. We consider the harmfulness in context of the entire record. *Id.* If no objection was made, we will reverse only if the record shows "egregious harm" to the defendant. *Ngo*, 175 S.W.3d at 743.

B. Discussion

1. Article 37.07 Error

Barthelman argues that the trial court erred by failing to give jurors a reasonable doubt instruction as to the testimony of Schmidt, the State's only witness during the punishment phase of trial. Schmidt testified that sometime around 1981 and 1982, when he was age 12, he attended scuba diving camp in Mayo, Florida. According to Schmidt, Barthelman was the owner of the camp and was assisted by a boy named "Neal," who was approximately fourteen or fifteen in age at the time. Schmidt testified that one night while attending the camp, he witnessed Barthelman photographing Neal as he fondled a fellow camp attendee named "Rickey." Barthelman argues that in order for the jury to properly consider Schmidt's extraneous evidence testimony in its decision on punishment, the trial court was required to provide an instruction under article 37.07, section 3(a) of the code of criminal procedure. The State concedes this point, and we likewise agree with Barthelman's argument that this provision is the law applicable to the case, and failure to give this instruction amounted to error.

Article 37.07, section 3(a) requires that prior crimes or bad acts evidence may not be considered in assessing punishment until the fact-finder is satisfied beyond a

reasonable doubt that these prior acts are attributable to the defendant. Once this requirement is met, the fact-finder may use the evidence however it chooses *in assessing punishment.* *Fields v. State*, 1 S.W.3d 687, 688 (Tex. Crim. App. 1999) (emphasis in original). Absent such instruction, the jury might apply a standard of proof less than reasonable doubt in its determination of the defendant's connection to such offenses and bad acts, contrary to article 37.07, section 3(a). *See Huizar v. State*, 12 S.W.3d 479, 484 (Tex. Crim. App. 2000). Because the State used Schmidt's testimony during the punishment phase of trial, the trial court erred by failing to provide the jury with a relevant instruction regarding this evidence under article 37.07, section 3(a).

2. Harm Analysis

Despite Barthelman's briefing to the contrary, *Huizar* holds that a trial court's failure to provide an article 37.07, section 3(a) instruction is pure charge error subject to the standard charge error harm analysis. *See id.* at 484–85; *see also Ngo*, 175 S.W.3d at 743 (articulating charge error harm analysis). The record is clear that Barthelman did not object to the charge provided during the punishment phase of trial. Therefore, we will reverse only if the record shows "egregious harm" to the defendant. *See id*.

Jury-charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. *Marshall v. State*, 479 S.W.3d 840, 843 (Tex. Crim. App. 2016). In examining the record to determine whether charge error is egregious, we traditionally consider: (1) the entirety of the jury charge itself; (2) the state of the evidence; (3) counsel's arguments; and (4) any other relevant information revealed by the entire trial record. *See id.* Egregious harm is a difficult standard to meet, and such a determination must be made on a case-

by-case basis. *Id.*

As noted earlier in this opinion, the evidence presented to the jury at trial was sufficient to support beyond a reasonable doubt Barthelman's convictions related to his possession of child pornography, and promotion of such material. Schmidt's credibility was also put into question by the State, when it asked, and he admitted, that he had been convicted in the past of burglary and perjury. During closing arguments at punishment, both sides mentioned Schmidt's testimony, but neither side spent an unreasonable time focusing on his testimony. However, Barthelman's attorney placed Schmidt's credibility at issue before the jurors by questioning why he waited thirty-five years before coming forward to accuse Barthelman of his alleged past at the scuba diving camp. Finally, the State asked the jury to sentence Barthelman to a maximum punishment for each count. The punishment range for each count spanned from two to twenty years' imprisonment for the first count and two to ten years' imprisonment for the remaining fourteen counts. *See* TEX. PENAL CODE ANN. §§ 12.33 (Second-Degree Felony Punishment); 12.34 (Third-Degree Felony Punishment). Despite this argument from the State, the jury sentenced Barthelman to the maximum punishment for count one only and assessed the minimum punishment on the remaining possession counts. Based on the foregoing considerations, we cannot conclude that the trial court's charge error affected the very basis of Barthelman's case, deprived Barthelman of a valuable right, or vitally affected a defensive theory to amount to egregious error. Accordingly, we overrule Barthelman's fifth issue.

V. CONSECUTIVE SENTENCE

By Barthelman's sixth issue, he asserts that the trial court erred by ordering his sentences to run consecutively because it violated various provisions of the United States and Texas constitutions.

A. Standard of Review

The decision of whether multiple sentences will run consecutively or concurrently is left to the trial court's discretion and does not turn on any discrete or particular findings of fact on the judge's part. *See Barrow v. State*, 207 S.W.3d 377, 380 (Tex. Crim. App. 2006).

B. Discussion

Barthelman argues that the trial court reversibly erred by deciding to run his sentences consecutively because it violated his: (1) Fifth Amendment Due Process rights of the United States Constitution; (2) Sixth Amendment right to a jury trial of the United States Constitution; (3) Sixth Amendment right to effective assistance of counsel of the United States Constitution; (4) Eighth Amendment right against cruel and unusual punishment of the United States Constitution; (5) Fourteenth Amendment equal protection right of the United States Constitution; (6) Article I, Section 19 right to due course of law of the Texas Constitution; (7) Article I, Section 13, 15, 29, right to a jury trial of the Texas Constitution; and (8) Article I, Section 13 right against cruel and unusual punishment of the Texas Constitution.

The Texas Court of Criminal Appeals has labeled a trial court's decision of whether to cumulate sentences as "unassailable on appeal." *Id.* at 381. In explaining why, the court stated the following:

> The Legislature was not required to provide the option to cumulate sentences at all. That the Legislature did so provide, but then reserved the cumulation aspect of punishment for the judge rather than the jury, does not change its essentially normative, non-fact-bound character.
>
> The discretionary assessment of punishment within legislatively prescribed boundaries has long been ingrained and accepted in American jurisprudence. In *United States v. Booker,* the Supreme Court observed that it has "never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." Further, the Court went on to say, "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." We do not believe that the legislatively endowed, normative decision whether to cumulate sentences exceeds that level of discretion that the Supreme Court has always recognized as consistent with due process. The Legislature has charged the trial court with the determination of whether to cumulate, and the trial court is free to make this determination so long as the individual sentences are not elevated beyond their respective statutory maximums.

Id. at 381–82.

In this case, none of the sentences were elevated beyond their respective statutory maximums. Thus, the trial court's decision to run Barthelman's sentences cumulatively did not violate his due process or due course of law rights under the United States or Texas Constitutions. Furthermore, we note that Barthelman raised none of the remaining constitutional arguments before the trial court, and, therefore, they were not properly preserved for our review. To preserve error for appellate review, the complaining party must make a timely, specific objection and obtain a ruling on the objection. *See* TEX. R. APP. P. 33.1(a). An appellate court will not consider arguments that were not preserved for review, even those of constitutional magnitude. *See Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995). Accordingly, we decline to address the remainder of Barthelman's issues. *See id.* We overrule Barthelman's sixth

issue.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

By his seventh issue, Barthelman asserts that "several errors" by his trial counsel amounted to ineffective assistance of counsel.

A. Standard of Review and Applicable Law

Strickland v. Washington sets forth a two-prong test for reviewing a claim of ineffective assistance of counsel. *See* 466 U.S. 668, 687 (1984). Under *Strickland's* first prong, a defendant must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness. *See id*. To make this showing, the defendant must identify the "acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id*. at 690. The reviewing court must then determine "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id*.

Generally, if the record is silent as to why trial counsel engaged in the action being challenged as ineffective, there is a "strong presumption" that counsel's conduct was the result of sound trial strategy, falling within the wide range of reasonable professional assistance. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) (citing *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984)). To overcome this presumption, a claim of ineffective assistance must be firmly demonstrated in the record. *Id*. at 814.

Direct appeal is usually an inadequate vehicle for raising an ineffective-assistance claim because the record is frequently undeveloped. *See Menefield v. State*, 363

S.W.3d 591, 592–93 (Tex. Crim. App. 2012). Counsel usually must be afforded an opportunity to explain his challenged actions before a court concludes that his performance was deficient. *Id*. at 593. If trial counsel has not had such an opportunity, we will not find deficient performance unless the conduct "was so outrageous that no competent attorney would have engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005).

Under *Strickland's* second prong, the defendant must demonstrate that counsel's deficient performance was so serious that it deprived him of a fair trial—i.e., a trial whose result is reliable. *See* 466 U.S. at 687. To demonstrate prejudice, the defendant must show that but for his trial counsel's deficient performance, there is a "reasonable probability" that the outcome of the trial would have been different. *Id*. at 694. A "reasonable probability" in this context refers to a "probability sufficient to undermine confidence in the outcome." *Id*.

B. Discussion

Barthelman contends that his counsel was ineffective in several respects: (1) failing to object to thousands of pornographic images and personal property that were obtained by police without a warrant, and that were clearly prejudicial under the rules of evidence; (2) failing to request a limiting instruction during both phases of his trial as to the use of this evidence; (3) failing to object to a reasonable doubt instruction during the punishment phase of trial regarding the testimony from Tony Schmidt; (4) failing to object to evidence related to Barthelman being out of the country and emails referencing homosexual parades and children being referred to as "candy"; (5) failing to pursue a motion in limine from the trial court to keep the items seized by police from being

introduced as evidence; (6) failing to object to various comments and arguments made by the prosecutor; and (7) generally failing to challenge the jury's finding of guilt and failing to prevent the cumulation of Barthelman's sentences.

First, we note that the record is undeveloped on this issue, and Barthelman's trial counsel was not afforded an opportunity to explain his challenged actions. Therefore, without any explanation from Barthelman's trial counsel, we will not find deficient performance unless the conduct "was so outrageous that no competent attorney would have engaged in it." *See Goodspeed*, 187 S.W.3d at 392. Generally, all of Barthelman's complaints relate to his trial counsel's failure to object on evidentiary matters and arguments made by the State's prosecutor, and failing to challenge the jury's finding of guilt and the trial court's subsequent sentence. We hold that none of these purported failures by counsel are "so outrageous that no competent attorney would have engaged in it." *See id.* We further note that there is a "strong presumption" that counsel's conduct was the result of sound trial strategy, falling within the wide range of reasonable professional assistance. *See Thompson*, 9 S.W.3d at 813. Based on the record of this case, Barthelman fails to rebut this strong presumption that his counsel's purported failures were not the result of sound trial strategy. Accordingly, we overrule Barthelman's seventh issue.

VII. DOUBLE JEOPARDY

By his eighth and final issue, Barthelman contends that the trial court reversibly erred by sentencing him to the fifteen counts in the indictment because "several of the counts were barred by double jeopardy."

A. Applicable Law and Standard of Review

The Fifth Amendment's Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." *Ex parte Denton*, 399 S.W.3d 540, 545 (Tex. Crim. App. 2013) (citing U.S. CONST. amend. V). The Double Jeopardy Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, protects an accused against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *Id.*

To determine whether there have been multiple punishments for the same offense, we apply the "same elements" test from *Blockburger v. United States*, 284 U.S. 299, 304. *See Ex parte Denton*, 399 S.W.3d at 545. "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." *Id.* at 545–46 (citing *Blockburger*, 284 U.S. at 304)). When resolving whether two crimes are the same for double-jeopardy purposes, we focus on the elements alleged in the charging instrument. In the multiple punishment context, the *Blockburger* test is no more than a rule of statutory construction, useful in discerning the legislative intent as to scope of punishment where the intent is not otherwise manifested. *Garza v. State*, 213 S.W.3d 338, 351 (Tex. Crim. App. 2007). The *Blockburger* test does not operate, however to trump "clearly expressed legislative intent." *Id.* at 351–52.

B. Discussion

Barthelman challenges his convictions under counts eleven, twelve, thirteen, fourteen, and fifteen (all possession counts) on double jeopardy grounds. The basis for counts eleven through fifteen are contained in five separate video clips located on State's Exhibit 30. Barthelman argues that because the video clips were all located on one DVD, it should have been charged simply as one count rather than five. We disagree.

A person commits the offense of possession of child pornography if (1) the person knowingly or intentionally possesses, or knowingly or intentionally accesses with intent to view, visual material that visually depicts a child younger than eighteen years of age at the time the image of the child was made who is engaging in sexual conduct, including a child who engages in sexual conduct as a victim of an offense under Section 20A.02(a)(5), (6), (7), or (8); and (2) the person knows that the material depicts the child as described by Subdivision (1). *See* TEX. PENAL CODE ANN. § 43.26(a). Relevant to this case, "visual material" means: any film, photograph, videotape, negative, or slide or any photographic reproduction that contains or incorporates in any manner any film, photograph, videotape, negative, or slide. *Id.* § 43.26(b)(3)(A). Here, each count represented five different and distinct pieces of visual material consolidated into one DVD. As a result, for purposes of section 43.26(a) of the penal code, no double jeopardy violation took place. *See Blockburger*, 284 U.S. at 304; *Garza*, 213 S.W.3d at 351. We overrule Barthelman's final issue.

VIII. CONCLUSION

We affirm the trial court's judgment.

GINA M. BENAVIDES,
Justice

Do not publish.
TEX. R. APP. P. 47.2 (b).

Delivered and filed the
13th day of October, 2016.