No. 127683

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- JOHN T. McKOWN, Petitioner-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-19-0660. There on appeal from the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, No. 18-CF-136. Honorable Thomas E. Griffith, Judge Presiding.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

JAMES E. CHADD
State Appellate Defender

CATHERINE K. HART
Deputy Defender

BRYAN JW MCINTYRE
Assistant Appellate Defender
Office of the State Appellate Defender
Fourth Judicial District
400 West Monroe Street, Suite 303
Springfield, IL 62704
(217) 782-3654
4thdistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER-APPELLANT

ORAL ARGUMENT REQUESTED

E-FILED
1/31/2022 2:00 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

TABLE OF CONTENTS AND POINTS AND AUTHORITIES

II.

NATURE OF THE CASE

John T. McKown was convicted of predatory criminal sexual assault of a child, two counts of aggravated sexual abuse, and unlawful possession of child pornography after a bench trial and was sentenced to a term of 15 years' imprisonment, consecutive to two terms of 5 years', and one term of 3 years' imprisonment for the respective offenses. The appellate court reversed one of John's convictions for aggravated sexual abuse, but affirmed his other convictions.

This is a direct appeal from the judgment of the court below. No issue is raised challenging the charging instrument.

ISSUES PRESENTED FOR REVIEW

I. Whether the creation of a handmade collage of otherwise lawful images cut from magazines can constitute child pornography pursuant to 720 ILCS 5/11-20.1(a)(1)(ii), where it is uncontested that no children engaged in any sex acts for the creation of such collage.

II. Whether the *corpus delicti* rule bars conviction for predatory criminal sexual assault and aggravated criminal sexual abuse as alleged in Counts I and V, respectively, where J.M.'s testimony did not relate to the specific events described in John McKown's inculpatory statement to police.

STATUTES AND RULES INVOLVED

"A person commits child pornography who:

(a)(1) films, videotapes, photographs, or otherwise depicts or portrays by means of any similar visual medium or reproduction or depicts by computer any child whom he or she knows or reasonably should know to be under the age of 18 * * * where such child * * * is:

* * *

(ii) actually or by simulation engaged in any act of sexual penetration or sexual conduct involving the * * * mouth * * * of the child * * * and the sex organs of another person[; or]

* * *

(2) with the knowledge of the nature or content thereof, reproduces, disseminates, offers to disseminate, exhibits or possesses with intent to disseminate any film, videotape, photograph or other similar visual reproduction or depiction by computer of any child * * * whom the person knows or reasonably should know to be under the age of 18 * * *, engaged in any activity described in subparagraphs (i) through (vii) of paragraph (1) of this subsection; or

(3) with knowledge of the subject matter or theme thereof, produces any stage play, live performance, film, videotape or other similar visual portrayal or depiction by computer which includes a child whom the person knows or reasonably should know to be under the age of 18 * * * engaged in any activity described in subparagraphs (i) through (vii) of paragraph (1) of this subsection; or

* * *

(6) with knowledge of the nature or content thereof, possesses any film, videotape, photograph or other similar visual reproduction or depiction by computer of any child * * * whom the person knows or reasonably should know to be under the age of 18 * * *, engaged in any activity described in subparagraphs (i) through (vii) of paragraph (1) of this subsection[.]

* * *

(f)(7) For the purposes of this Section, 'child pornography' includes a film, videotape, photograph, or other similar visual medium or reproduction or depiction by computer that is, or appears to be, that of a person, either in part, or in total, under the age of 18 * * *, regardless of the method by which the film, videotape, photograph, or other similar visual medium or reproduction or depiction by computer is created, adopted, or modified to appear as such. 'Child pornography' also includes a film, videotape, photograph, or other similar visual medium or reproduction or depiction by computer that is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the film, videotape, photograph, or other similar visual medium or reproduction or depiction by computer is of a person under the age of 18[.]" 720 ILCS 5/11-20.1 *et seq* (2018) (including pertinent subsections).

STATEMENT OF FACTS

On January 15, 2018, detectives from the Decatur police department questioned John McKown about allegations of inappropriate contact with his grandson J.M. (R168) John was 68 years old at the time; he lived with his wife Cheryl McKown and his adult son Brian McKown. (Sec C4; R140-142) Until the summer of 2017, Brian's son J.M. had visited his father at John's home. (R143-144; 224) At his home on January 15, 2018, detectives informed John that J.M. had accused him of sexual assault; John denied any inappropriate contact. (R170) When questioned about his "pictures of cut-out children," John led the detectives to his basement. (R170-173) In a corner of the basement (cordoned off by bed sheets) which John referred to as his "man cave," detectives found a small television, a DVD player, a collection of DVDs, and several magazines with pictures cut from them. (R175-176, 178-185, 189; E13-19)

John had assembled a number of the cut-out magazine images into collages. (E7, 9, 12) He had cut several pictures of children's faces from parenting magazines and cut slits across the mouths of some of them. (E13) From adult magazines, John had cut pictures of erect penises. (E14) John's collages featured various combinations of these two types of image, along with images of nude or partially nude adult women. (E16, 19) In some instances, an image of a penis was inserted into the slit cut into the image of a child's face and fastened there with a piece of tape. (E7, 9, 12)

Both at his home and later the same day at the police station, John informed detectives that he had never had inappropriate contact with J.M. or with any other child. (R170) John had begun making the collages when he was a teen, as a way to cope with abuse he suffered at the hands of an uncle several years before. ("People's Ex 1" 0:25:40-0:26:25) John was ashamed of the collages, but insisted that he had never acted on the thoughts they represented; he asked detectives to help him find a healthier way to cope with the abuse he had suffered as a child. ("People's Ex 1" 0:28:00-0:33:45)

John was not the last member of his family to be abused: Brian McKown was abducted, taken to Disney World, and repeatedly sodomized over the course of a month during his teen years. (R243-244) Brian later married Jacqueline McKown and they had two children together, but he moved back in with his parents after separating from Jacqueline in 2010. (R146) Brian began telling J.M. – in detail – about the abuse he had suffered as a child as often as he could (every day) starting at the age of six years old, in an effort to make J.M. "more aware of the dangers that were out there in the world." (R243-244) Outside of this context, no one in the home had ever talked about going to Disney-themed parks. (R241-243) When Brian was working or otherwise away from the home while his children were visiting, his mother Cheryl would watch the children. (R229-230) John spent most of his time in the basement. (R226, 238)

Cheryl McKown suffered from partial paralysis of the back, breathing problems, and a number of other ailments. (R229-230) Brian's daughter K.M. (J.M.'s older sister) stopped visiting the McKowns at a young age because her autism made her too volatile for Cheryl to manage. (R141, 144) J.M. continued to visit during weekends and school vacations until 2017, when his mother learned that J.M. spent large amounts of unsupervised time with a neighbor child outside of the McKown home. (R143-144, 147, 224) In October of 2017, K.M. informed authorities that her mother's boyfriend was sexually abusing her. (R148) While K.M. was being evaluated at the hospital following this revelation, J.M. informed his mother that he had been abused by John McKown. (R207-208)

J.M. was interviewed by forensic interviewer Denise Johnson at the Sangamon County Child Advocacy Center on December 2, 2017. (R153-156) When asked to describe what happened, J.M. said "I was molested, just like my sister was." ("People's Ex 9" 0:03:45-0:04:02) J.M. drew a picture (E23) and informed his interviewer that John had "made me bend over, that's my butt, and he did that. That's his thing." ("People's Ex 9" 0:04:03-0:04:25)

J.M. next volunteered "but some weird oozy stuff came out of it. I know what it's called. Semen.* * * I had to wipe my butt with toilet paper." ("People's Ex 9" 0:04:40-0:05:05) J.M. confirmed that this had happened "in the bathroom every time." ("People's Ex 9" 0:6:15-0:06:25) J.M. stated that this had started when he was about six years old; he alleged that John would come into the bathroom and pull down J.M.'s pants without saying anything. ("People's Ex 9" 0:06:45-0:07:10)

J.M. claimed that, after the first time, John "said he was going to take us to Disneyland. He was gonna bribe us – he was bribing me, basically." ("People's Ex 9" 0:07:00-0:07:22) J.M. claimed that John had shoved J.M. against the bathroom wall and put his "thing" in J.M.'s butt while wearing an "extender:" "[h]e did it the same way every time." ("People's Ex 9" 0:07:30-0:08:35) J.M. claimed that John "pushed it in and out," and said that semen would come out "like throughout the thing." ("People's Ex 9" 0:09:12-0:10:09) The last time this had happened, according to J.M., was after the firework display on July 4, 2017. ("People's Ex 9" 0:10:15-0:10:40) J.M. stated this had happened in "three different houses: a blue house, a white house, and an alabaster house" where John still lived. ("People's Ex 9" 0:10:44-0:11:47) John would take his pants completely off, but his shoes would stay on every time; everybody else (Cheryl, Brian, and J.M.'s cousin) would be in the living room watching television when it happened. ("People's Ex 9" 0:12:05-0:13:40)

J.M. described pictures on John's basement table, with "pictures of cut-out children" "like from magazines" and "pictures of penises, cut-out pictures." ("People's Ex 9" 0:13:43-0:14:23) These were "pictures from a magazine. 'Cause if they were from a camera [J.M.] would have known." ("People's Ex 9" 0:14:24-0:14:43) J.M. further claimed that John watched "kiddie porn" movies in the basement: "kids and adults doing it[;] what he did to me." ("People's Ex 9" 0:15:10-0:15:26) J.M. said he had seen the "kiddie porn" while spying on John through

a gap in the basement curtains one day. ("People's Ex 9" 0:15:30-0:16:11) J.M. also claimed that John had "the pictures of the penises" on a SurfacePro3 electronic tablet. ("People's Ex 9" 0:16:15-0:16:45) Ms. Johnson asked J.M. if John had ever done anything else; J.M. replied "No. He tried to put it in my mouth but I bit it and he never really did it again." ("People's Ex 9" 0:17:49-0:18:09)

J.M. went on to describe the abuse K.M. suffered at the hands of Jacqueline's boyfriend "Benny" in some detail. "We thought she was pregnant by Benny. Do you know what bondage straps are?" ("People's Ex 9" 0:19:45-0:20:00) He told Ms. Johnson about the indentations Benny's leather restraints had left on K.M.'s legs and wrists, as well as the damage Benny had done to K.M.'s pelvis and bladder. ("People's Ex 9" 0:20:00-0:21:30) "Now it all makes sense, because he [was] my mom's boyfriend, and he stopped doing what he did with her. They slept in the same bed * * * but then he started sleeping downstairs on the couch, and that's when he got [K.M.] * * * We knew something was just wrong." ("People's Ex 9" 0:21:38-0:22:20) J.M. had talked to both K.M. and his mother about speaking with someone at the Child Advocacy Center, and asked whether "a girl named Brianna" (who had been involved in his sister's case) was watching. ("People's Ex 9" 0:24:45-0:26:12)

On January 15, 2018, after John showed detectives around his basement, he was taken to the station for questioning. (R194) Detectives informed John that J.M. claimed John's bare penis and semen had touched J.M.'s bare buttocks. ("People's Ex 1" 0:21:27–0:21:55) John denied these allegations and, though he was not placed under arrest, he agreed to submit to a "voice stress test." ("People's Ex 1" 0:22:30–0:21:55) Before the test was administered, John told the detective that J.M. had walked into the "man cave" approximately three different times while John was masturbating in the Summer of 2017; each time, John yelled at J.M. to leave and he did so. ("People's Ex 1" 0:36:40-0:37:22)

John became confused by the instructions for the "voice stress test," requiring the detective to repeat those instructions several times. ("People's Ex 1" 0:41:30-0:50:00) After the test had been administered, Detective Eric Mathews informed John that his voice showed "signs of stress" when he stated that neither his penis nor his semen had ever made contact with J.M.'s skin. ("People's Ex 1" 1:17:40-1:18:14) Detective Mathews explained that an innocent person would not show any stress when asked whether their penis or semen had touched a child's buttocks and informed John that this must mean John was lying; he insisted that John tell a story more like J.M.'s. ("People's Ex 1" 1:18:14-1:56:00, 1:58:30-2:06:15, 2:15:30-2:47:05, 2:56:30-3:18:40)

John told Detective Mathews that J.M. had once surprised John by bursting in, saying "what's this," and grabbing John's penis after John finished masturbating one day; that was the only way John's penis or semen might have ever touched J.M.'s bare skin. ("People's Ex 1" 1:33:10-1:35:30) When asked to give Detective Mathews "an example of what [J.M.] could have misconstrued" as anal sex, John stated that he had allowed J.M. to remain in the basement after J.M. caught him masturbating on two other occasions. ("People's Ex 1" 2:57:00-3:01:20) John claimed J.M. had asked about "the white stuff" one of those two times; John stated that he had answered J.M.'s questions about masturbation in hopes of closing the subject. ("People's Ex 1" 3:01:20-3:01:50) John told Detective Mathews that he had continued masturbating on the last occasion to demonstrate the process for J.M., but that neither he nor J.M. had touched one another. ("People's Ex 1" 2:57:00-3:09:00)

On January 24, 2018, John was brought back to the police station for further questioning; this time, he was placed under arrest and advised of his rights. ("People's Ex 2" 0:01:00-0:02:05) Detective Mathews believed John had been lying during his previous interview, and that "something else sexually happened" between John and J.M. ("People's Ex 2" 0:02:05-0:02:23)

While there could be counseling or other help available to John for the abuse he had suffered as a child, that help would not be provided unless he demonstrated remorse by telling detectives "the whole truth" about what happened with J.M. ("People's Ex 2" 0:02:23-0:05:15)

John next told detectives that, when J.M. had asked John about masturbation, John and J.M. had each placed their hand on the other's penis for a few seconds. ("People's Ex 2" 0:05:15-0:10:08) Detective Mathews told John that he believed J.M.'s account, and that "there was some sort of an anal sex thing" as well. ("People's Ex 2" 0:10:45 -0:13:32) John denied ever engaging in – or even being interested in – any form of anal sex; Detective Mathews explained that, if John would not tell another story, the judge and jury would be left to presume he was a "monster." ("People's Ex 2" 0:12:57-0:14:02) "Whether it's [J.M.] wanted to learn and he came to you because he felt comfortable with this kind of thing," or "you're this evil person who just shoved him to the ground and anally raped him violently. I don't know." ("People's Ex 2" 0:14:15-0:17:25)

John then stated that, the final time J.M. came into the basement, he asked what anal sex might feel like; John responded that he did not know. ("People's Ex 2" 0:17:40-0:17:55) He said that J.M. then pulled down his shorts and underwear before bending over in front of John. ("People's Ex 2" 0:18:15-0:18:23) John stated that he had pulled out his penis and rubbed it against J.M.'s rectum for a few seconds, then stopped. ("People's Ex 2" 0:18:25-0:19:18) John had neither penetrated J.M.'s rectum nor ejaculated; he had, however, just finished masturbating with Vaseline while watching pornography when J.M. came in. ("People's Ex 2" 0:19:20-0:23:30) This had happened one time, in John's "man cave" in the basement of the McKown home; nothing similar had ever happened in a bathroom or at any other time or place. ("People's Ex 2" 0:23:15-0:24:15)

In October of 2018, J.M. gave another recorded statement to Ms. Johnson. (R119) This time, he claimed that he had a "flashback about grandma" while he was being home-schooled by his mother the previous month. ("Defendant's Ex 1" 0:01:15-0:02:37) The flashback helped him remember that Cheryl McKown had "butt-fucked [him] with a dildo, a red long thingy." ("Defendant's Ex 1" 0:02:45-0:03:06) "It was cheap." ("Defendant's Ex 1" 0:03:11-0:03:13) J.M. claimed Cheryl had done "exactly what John did;" when asked to elaborate, he said "it kept pushing it in and out." ("Defendant's Ex 1" 0:03:40-0:04:46) He informed Ms. Johnson that he "remembered this in a dream:" Cheryl had done this to him "every day or every other day" while giving him a bath starting when he was seven years old. ("Defendant's Ex 1" 0:07:10-0:07:49) J.M. claimed that he would fight Cheryl, but she would climb into the tub to finish violating him while she or John held J.M. down. ("Defendant's Ex 1" 0:07:50-0:09:40) J.M. claimed that these encounters had ended when he gave John a black eye, "and another time, grandma was doing that to me again, I just had enough balls to reach behind her, grab the thing, and start smacking 'em with it." ("Defendant's Ex 1" 0:12:00-0:12:38)

J.M. had forgotten these events until after he first accused John; he said that he had suppressed all memory of abuse until he began having "dreams and flashbacks" when he was eight years old. ("Defendant's Ex 1" 0:06:48-0:07:21, 0:14:04-0:14:50) He began talking about things John had allegedly done, but Ms. Johnson interrupted him to tell him that they had already talked about John: this interview was supposed to be about Cheryl McKown. ("Defendant's Ex 1" 0:13:56-0:14:12) Seconds after being told that they would not be discussing John that day, J.M. covered his eyes and began moaning. ("Defendant's Ex 1" 0:14:16-0:14:28) He informed Ms. Johnson that he had just had another flashback: "I've had that one before." J.M. stated that he has these flashbacks "a lot," about "grandpa, the abuse." ("Defendant's Ex 1" 0:14:30-0:15:30) J.M. claimed that the last time Cheryl had used the "red thing" on him had been

June of 2017; he said that he had managed to escape to the house of a friend in the neighborhood and called his mother at 3:00 a.m. to come and pick him up. ("Defendant's Ex 1" 0:16:35-0:17:06) Laughing, J.M. explained that the next morning was the day "when my mom had me pack up and get the hell out of there." ("Defendant's Ex 1" 0:17:27-0:17:33)

J.M. reiterated that any inappropriate contact with John or Cheryl had happened exclusively in the bathroom; this time, he said his father and cousin were usually gone from the home when it happened. ("Defendant's Ex 1" 0:18:35-0:19:35; 0:22:30-0:22:55) J.M. now claimed that he had started "conning" John and Cheryl out of money at the age of nine, "I said 'give me this or I'll tell.' Like 'cause I knew it wasn't gonna stop so I just started conning them out of money and stuff." ("Defendant's Ex 1" 0:24:11-0:25:05) J.M. had a "flashback" about these events while playing video games; he had said "grandma," then his mother and maternal grandmother helped him figure out that Cheryl had molested him. ("Defendant's Ex 1" 0:25:25-0:26:26) J.M. now believed Cheryl had molested him "every chance she got. The McKowns are perverted and nasty.* * * Almost every other day, like she had a schedule or something." ("Defendant's Ex 1" 0:29:30-0:30:12)

J.M. said that Cheryl had placed petroleum jelly or something similar on the red dildo before putting it in his butt; he had never seen the petroleum jelly, but he knew what petroleum jelly felt like because his mother had "put that in there" before when he was constipated. ("Defendant's Ex 1" 0:30:15-0:31:24) J.M. next claimed that "they beat me with a belt," raising his shirt to demonstrate. ("Defendant's Ex 1" 0:31:26-0:31:38) J.M. claimed that he had once tried to tell Brian about what was going on, but was unable to do so; when he came inside, John took off his belt and hit J.M. ("Defendant's Ex 1" 0:31:38-0:31:48) J.M. stated this happened "a lot, like when I wouldn't keep my mouth shut." ("Defendant's Ex 1" 0:31:50-0:32:05) J.M. claimed that John used the belt "like a whip or something. Like have you ever seen a

Catwoman movie?" ("Defendant's Ex 1" 032:05-0:32:21) Laughing again, J.M. continued "now I personally think he was stupid doing that, 'cause he only - he used a cheap belt! But the McKown family is cheap. They get all this money and then they go to food banks. They're bedbug infested, gross. They make me sick." ("Defendant's Ex 1" 0:32:27-0:32:50)

Trial

John was charged in Count I with putting his penis in J.M.'s anus. (C51) Count II alleged that John placed his penis in J.M.'s mouth. (C19) Count III alleged that John placed an object in J.M.'s anus. (C20) Count IV alleged that John placed J.M.'s hand on John's penis. (C21) Count V alleged that John transfered semen to J.M.'s buttocks. (C22) Count VI alleged that John placed his hand on J.M.'s penis. (C38) Lastly, John was charged in Count VII with production of child pornography, a Class X felony pursuant to 720 ILCS 5/11-20.1(a)(1)(ii)(2018). (C39) The cause proceeded to a bench trial on April 2, 2019. (R89)

J.M. testified that John had placed his penis in J.M.'s mouth and in J.M.'s butt, always in the bathroom of the house in which the McKowns lived in 2017. (R106-109, 116) No other part of J.M.'s body had ever touched John's penis. (R109) J.M. testified that John had sometimes manipulated J.M.'s penis while his penis was in J. M.'s butt. (R109-111) Now twelve years old, J.M. denied ever having known what the "sticky stuff" was called. (R107) He persisted in his denial when asked about his first recorded interview, in which he had quickly volunteered that the "sticky stuff" was called "semen." (R120-121; "People's Ex 9" 0:04:40-0:05:05) J.M. denied telling anyone that Cheryl McKown participated in the abuse; he denied having ever made any sort of allegations against Cheryl McKown, even when confronted with the video of his second recorded interview. (R134-135; "Defendant's Ex 1" 0:02:45-0:04:46) J.M. testified that John had mostly abused him while no one else was home, and that he had never told Ms. Johnson that the abuse usually happened while his father, cousin, and grandmother

watched television in the living room. (R130) His father Brian was "usually out in a bar or something," "because he was always drinking," which J.M. knew because he said Brian "always had a bottle in his hand." (R131)

J.M. testified that John had not said anything to him before placing his penis in J.M.'s butt. (R118) When reminded of his contrary statement to Ms. Johnson in October of 2018, J.M. claimed that John had said "stay still mother effer" before the first time it had happened. (R119) He could not remember telling Ms. Johnson that the abuse had happened in the bathrooms of three homes; he testified that all inappropriate contact with John had happened in the bathroom of the "greenish-tan" house in which John lived in 2017. (R123-124) When questioned where he first heard the term "penis extender," J.M. testified that his mother had told him the term after he described the item to her. (R112-113) J.M. had never been in John's basement area when John was home, but had once snuck downstairs while John was away and had seen "pictures of, like, cut out little girls with pictures of cut out penises in their mouths." (R114-115)

Jacqueline McKown, J.M.'s mother, testified that J.M. had first told her the term "penis extender," which she had then looked up online. (R149-150) J.M. had first told Jacqueline that he had been abused in October of 2017, while they were waiting for K.M. to be X-rayed (to determine the extent of the damage Jacqueline's boyfriend had done). (R148) Jacqueline and Brian had finalized their divorce in 2018; she described the eight-year process as "amicable" and Brian as "not mentally an adult." (R145-146) She testified that she did not let the children speak negatively of Brian at home, despite "a drinking problem and various things over the years." (R146-147) Jacqueline was certain that the last time J.M. had visited the McKown home was July 1, 2017: that was the day she had learned that J.M.'s neighbor friend had been badly burned by fireworks, after which J.M. was not allowed to stay with Brian anymore. (R147)

Detectives found silicon masturbatory aides in John's basement, but were unable to locate a "penis extender" as J.M. had described. (R209-210) John was on a fixed budget and did not own any sort of electronic tablet, nor did detectives find any videos portraying children engaged in sexual activity. (R209-210) John's collages were admitted into evidence. (R210-217; E7-19) Video recordings of J.M.'s interviews with Denise Johnson on December 5, 2017 (R156-157; "People's Ex. 9"), and October 17, 2018 (R218; Defendant's Ex. 1"), were admitted without objection. A redacted video of John's January 15, 2018, interview with detectives (omitting the "voice stress" test and any time in which John was left alone in the interview room) was entered into evidence. (R194-196; "People's Ex. 1A") The full video of John's post-arrest interrogation was admitted as well. (R204-206; "People's Ex 2")

At the conclusion of the trial, the court remarked that "This was obviously a unique, bizarre, if not very bizarre case." (R281) Contrary to J.M.'s allegations, there had been no evidence of John ever owning a penis extender or videos containing child pornography; John did not appear to have ever possessed a computer or electronic tablet. (R281-282) Defense counsel had skillfully summed up the inconsistencies in J.M.'s allegations of abuse: "in terms of where it occurred, the number of times it occurred, the people who were present when it occurred, what occurred, whether grandma was involved in the process, whether threats were made, and so forth."(R280) "And if the State's case was solely based on [J.M.]'s testimony, I think we would be in a much different position today than where Mr. McKown finds himself. The inconsistencies account for the not guilty verdicts[.]" (R280)

The court found John not guilty of placing his hand on J.M.'s penis (Count VI): J.M. "said it never happened. The defendant said it did happen. I can't make a finding of beyond a reasonable doubt based on those statements." (R281) Still, the court believed that "something bad happened" to J.M. (R281) Therefore, it found John guilty of Counts I (alleging that John's penis contacted

J.M.'s rectum), IV (alleging that J.M.'s hand touched John's penis), and V (alleging that John transferred semen to J.M.'s buttocks). (R282; C21, 22, 51) "The defendant's admissions were very important, if not critical, to the State's case." (R282)

With regard to the collages, the trial court found that "it is certainly at face value child pornography." (R280-281) "It's perverse. It's sick, Mr. McKown, and it is child pornography." (R218) However, the court had reviewed federal cases on the subject and determined that "there were no children actually engaged in acts of child pornography. One was essentially taped or placed on the other." (R281) For this reason, the court stated, John was not guilty of the production of child pornography under 720 ILCS 5/11-20.1(a)(1)(ii) (2018). (R282) Nor were children's faces morphed onto the bodies of adults engaged in sexual activity; rather, the court found, John was guilty of the lesser-included offense of "possession" of child pornography because "it was penises that were actually morphed onto the children." (R282-283)

For the offense of predatory criminal sexual assault in Count I, the court imposed a sentence of fifteen years' imprisonment; this sentence would run consecutively to John's other sentences. (R303-304) For the two offenses of aggravated sexual abuse, alleging that John placed J.M.'s hand on John's penis (Count IV) and that John's semen made contact with J.M.'s buttocks (Count V), John received concurrent five-year prison sentences. (R304) Finally, for the offense of possession of child pornography, John would serve a three-year prison term (to run concurrently with the two five-year terms). (R304; Sup C4) In denying John's motion for new trial (C87), the trial court stated "the counts to which Mr. McKown was found guilty were all counts where [J.M.] indicated something had occurred, and then by the defendant's own statement he confessed or corroborated the same behavior." (R293-294)

On appeal, John argued that the collages in question could not constitute child pornography because it was uncontested that no children had engaged in sexual conduct for – nor been otherwise involved in – the creation of the images. (Appellant's Brief, p. 30-34)

Where it was obvious that no child had engaged in a live sex act for their production, he argued, the images could not constitute child pornography. (Appellant's Brief, p. 33) Additionally, John argued, there had been insufficient evidence to support his convictions for predatory criminal sexual assault or criminal sexual abuse under Counts I, IV, and V. (Appellant's Brief, p. 19-29) Finally, John argued that the trial court misapplied the *corpus delicti* rule: where none of the events or circumstances in John's stories were corroborated by independent evidence, none of his statements could be considered as evidence of guilt. (Appellant's Brief, p. 27-29)

The appellate court agreed with John as to the application of the *corpus delicti* rule to Count IV, where J.M.'s testimony (the only evidence other than John's statement) clearly showed that the contact did not occur. *People v. McKown*, 2021 IL App (4th) 190660, ¶ 37. Nevertheless, the appellate court affirmed John's remaining convictions. *Id.* It reasoned that the trial court must have found J.M.'s testimony credible, "particularly where corroborated by" John's incriminating statements. *Id.* at ¶ 53. The appellate court endorsed the trial court's determination that John's statements to Detective Mathews had not been coerced and were therefore reliable, concluding that "defendant's admissions supported J.M.'s statements regarding the specific sexual acts alleged in counts I and V." *Id.* at ¶ 54.

Regarding John's conviction for possession of child pornography, the appellate court determined that anyone who adds an image of adult genitalia to "images of real, identifiable children" commits the offense of child pornography. *Id.* at ¶ 67. The appellate court referenced this Court's decision in *People v. Alexander*, stating that this Court had "found a portion of the Illinois child pornography statute also violated first amendment protections because * * * it included a ban on virtual child pornography rather than pornography made with identifiable children." *Id.* at ¶ 62. The appellate court relied on the fact that John "did not deny that the 'collages' he created involved [pictures of] 'real' children rather than entirely virtual images." *Id.* at ¶ 63. Therefore, concluded the appellate court, John's collages constituted prohibited "morphed" images in violation of 720 ILCS 5/11-20.1 *et seq.* (2018). *Id.*

The appellate court found that John's collages harmed the children whose magazine images he had used, involving "the alteration of 'innocent pictures of real children so that the children appear to be engaged in sexual activity.'" *Id.* at ¶¶ 63-66. "Here, the materials defendant possessed indisputably involved images of real, identifiable children that were combined with images of penises to depict acts of oral penetration. Such materials fall within the coverage of section 11-20.1 of the Code, and [the United States Supreme Court decision in *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002)] does not require a different conclusion." *McKown*, 2021 IL App (4th) 190660 at ¶ 67. This Court granted leave to appeal on November 24, 2021.

ARGUMENT

I.

The creation of a handmade collage of otherwise lawful images cut from magazines cannot constitute child pornography pursuant to 720 ILCS 5/11-20.1(a)(1)(ii), where it is uncontested that no children engaged in any sex acts for the creation of such collage.

No government – state or federal – may criminalize speech merely because it relates to the topic of sexual conduct involving children. See, *e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 236 (2002). While governments have a compelling interest in protecting real children from exposure to sexually explicit content, the State interest lies in protecting the child from the sexual abuse (not in protecting the viewer from the *idea* of abuse). *Id* at 255. State governments may not criminalize privately held "virtual" child pornography: pornography produced without using actual children. See *id.*; see also *People v. Alexander*, 204 Ill. 2d 472, 483 (2003). A child pornography statute is unconstitutionally overbroad when it permits a defendant to be convicted even where it is evident that no children were harmed in the creation of the image. *Ashcroft*, 535 U.S. at 255-56.

As the trial court found, "in this particular case, there were no children actually engaged in acts of child pornography." (R281-282) The appellate court agreed: John's collages merely "combined, in a sexually explicit manner, images of actual children cut from parenting magazines with images of adult male genitalia that he cut from adult magazines." *People v. McKown*, 2021 IL App (4th) 190660, ¶ 56. The appellate court then held, in a published opinion, that "images of real, identifiable children that were combined with images of penises to depict acts of oral penetration * * * fall within the coverage of section 11-20.1 of the Code[.]" *Id.* at ¶ 67. The appellate court's analysis is deeply flawed, as it expands the definition of "child" under 720 ILCS 5/11-20.1(f)(7) (2018) to include all *images* of children, criminalizing private speech not tied to the crime of child abuse. *Cf.*, *e.g.*, *New York v. Ferber*, 458 U.S. 747, 765 (1982); *Ashcroft*, 535 U.S. at 236; *United States v. Williams*, 553 U.S. 285, 297 (2008).

The appellate court bases its conclusions largely on the decision of a federal district court for the Northern District of New York. *McKown*, 2021 IL App (4th) 190660 at ¶¶ 64-67. In that case, the defendant had electronically morphed non-pornographic pictures of children's faces onto pictures of adult women's bodies engaged in sexual acts. *United States v. Hotaling*, 599 F. Supp. 2d 306, 308 (N.D.N.Y. 2008). The *Hotaling* court discussed the federal "PROTECT" Act" under which that defendant was prosecuted, specifically the language of the federal statute defining "identifiable minors." *Id.* at 312. Notably, the definition of an "identifiable minor" in the PROTECT Act requires the depicted person to be a minor at the time the image was created or modified to become sexually explicit. 18 U.S.C.A. § 2256 *et seq.* (2020); *Hotaling*, 599 F. Supp. 2d at 316. Because the statute was written to address the purported harm to "identifiable" children, and because the prosecution had established that one of the children whose image was used was a minor at the time the image was created, the *Hotaling* court upheld a conviction under the federal statute. *Id.* at 321-322. The United States Supreme Court has yet to consider the *Hotaling* court's determination that the PROTECT Act's reference to "identifiable children" can be construed to criminalize images which would *not* cause a reasonable person to believe that the actors actually engaged in that conduct on camera. See *id.*; *Cf. Williams*, 553 U.S. at 297.

The appellate court has accepted the reasoning from *Hotaling*, without addressing the fact that the Illinois child pornography statute does not refer to "identifiable" children in the first place. *McKown*, 2021 IL App (4th) 190660 at ¶¶ 62-67; *cf.* 720 ILCS 5/11-20.1(f)(7) (2020). The appellate court's ruling also directly contradicts this Court's decision in *People v. Alexander*, which held that the definition of "child" in 720 ILCS 5/11-20.1(f)(7) (2006) refers to a human person, not to "identifiable children, and, accordingly, does not proscribe computer morphing as defined by the Court." *Alexander*, 204 Ill. 2d at 483. As the Illinois legislature has not since

expanded the definition of "child" or "child pornography matter," and as the Illinois statute makes no reference to "identifiable children," this Court's reasoning still applies with full force. *Id.* This Court should reverse John's conviction because his collages cannot constitutionally be deemed child pornography. It should also clarify the definition of a "child" under 720 ILCS 5/11-20.1(f)(7): specifically whether the statute can be construed to criminalize wholly fictional collages such as John's in light of the decisions of the United States Supreme Court.

A. Standard of Review & Authorities

Pure questions of statutory construction are reviewed *de novo*. See *People v. Kayer*, 2013 IL App (4th) 120028, ¶ 11. For a similar reason, this Court reviews *de novo* the question of whether or not a particular image constitutes child pornography under 720 ILCS 5/11-20.1. See, *e.g.*, *People v. Lamborn*, 185 Ill. 2d 585, 590 (1999). In the context of regulating such images, the Court must distinguish images which are offensive and perhaps obscene – but are not records of the sexual exploitation of a child – from those images which are themselves a record of the crime of child abuse. See *New York v. Ferber*, 458 U.S. 747, 758 (1982).

States may criminalize the advertisement or distribution of "obscene" materials only when such materials are carefully defined by statute. "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, * * *; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973) "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment." *Id.* at 23.

Also unprotected by the First Amendment is the related but distinct subject of child pornography: photographs, videotapes, or other recordings of any live performance in which a child engages in sexually explicit conduct. "The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for the purpose of clarity. The *Miller* formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole." *Ferber*, 458 U.S. at 764.

Child pornography may be criminalized without being offensive or appealing to the prurient interest, because child pornography statutes are aimed at the prevention of child abuse (rather than the prevention of speech). "The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment." *Id.* at 758. Weighed against the government's interest in protecting children from abuse, "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*." *Id.* at 762. "The First Amendment interest [curtailed by a legitimate statute] is limited to that of rendering the portrayal somewhat more 'realistic' by utilizing or photographing children." *Id.* at 763. "We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection." *Id.* at 764-65.

States may criminalize any recording – obscene or otherwise – of a real child engaged in sexually explicit conduct. See, *e.g.*, *id.* Such statutes do not impose criminal penalties based on the content of the depiction; rather, "as a permanent record of a child's abuse, the continued circulation itself would harm the child who had participated." *Ashcroft*, 535 U.S. at 249.

This analysis strikes the balance between the government's interest in protecting children from being forced to participate in sexual acts and individuals' constitutionally protected thought and speech. "To preserve these freedoms, and to protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct." *Id.* at 253. In order to constitute child pornography, the "portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera." *Williams*, 553 U.S. at 297.

States may not regulate private thought. "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Ashcroft*, 535 U.S. at 253. "In the case of the material covered by *Ferber*, the creation of the speech is itself the crime of child abuse; the prohibition deters the crime by removing the profit motive. * * * Even where there is an underlying crime, however, the Court has not allowed the suppression of speech in all cases.* * * We need not consider where to strike the balance in this case, because here, there is no underlying crime at all." *Id.*

States may not expand the definition of child pornography to include wholly fictionalized images of sexual conduct relating to children. "*Ferber* provides no support for a statute that eliminates the distinction [between actual and virtual child pornography] and makes the alternative mode criminal as well." *Ashcroft*, 535 U.S. at 251. A statute is unconstitutionally overbroad, even if it includes an affirmative defense for images created without using child actors, if "the defendant can demonstrate no children were harmed in producing the images, yet the affirmative defense would not bar the prosecution. For this reason, the affirmative defense cannot save the statute, for it leaves unprotected a substantial amount of speech not tied to the Government's interest in distinguishing images produced using real children from virtual ones." *Id.* at 256.

The *Ashcroft* Court struck certain provisions of the federal Child Pornography Prevention Act (CPPA), but did not evaluate other un-challenged provisions regarding computer "morphing" of images to create sexually explicit depictions without causing children to engage in sexual conduct. *Id.* at 242.

The definition of "child" in Illinois's child pornography statute was found to be unconstitutionally deficient by this Court. "Because we have concluded that the definition of 'child' in section 11–20.1(f)(7) is constitutionally infirm, we must resort to plain language." *People v. Alexander*, 204 Ill. 2d 472, 485 (2003). "[C]hild pornography '[m]atter' means 'any photographic product depicting *actual human models or actors*, whether in the form of still photographs, motion pictures, or videotape' (emphasis added). 'Child' means young human being; child means actual child." *Id.* at 486. In severing unconstitutional constructions of "child" from the statute, this Court found that "[t]he computer-morphing provision of the CPPA bars depictions of identifiable children.* * * The definition of 'child' in section 11–20.1(f)(7), by contrast, does not refer to identifiable children, and, accordingly, does not proscribe computer morphing as defined by the Court." *Alexander*, 204 Ill. 2d at 482–83.

"*Ashcroft* addressed only the question of whether a criminal prohibition of virtual child pornography—child pornography produced without using actual children—violated the first amendment." *Id.* at 487. "We need not revisit the issue of whether criminalizing child pornography of actual, not virtual, children violates the first amendment. That issue was answered conclusively and convincingly in *Ferber*, and the Illinois child pornography statute comports with that case." *Id.*

B. John's collages did not violate 720 ILCS 5/11-20 (2018), where no child was involved in sexual activity for the collages' creation.

The government may impose carefully defined content-based restrictions on obscene speech, and may criminalize the creation, distribution, and possession of depictions of actual children engaging in sexually explicit conduct. See, *e.g.*, *Miller*, 413 U.S. at 24; *Ferber*, 458 U.S. at 764–65; *Williams*, 553 U.S. at 297. Child pornography statutes may not criminalize

lewd images because they are lewd, but they may rely on the fact that someone has filmed, photographed, or otherwise memorialized a real child being subjected to sexually explicit content to show that the child has been abused. "A performance is defined only to include live or visual depictions: 'any play, motion picture, photograph or dance * * * [or] other visual representation exhibited before an audience.'" *Ferber*, 458 U.S. at 765. The message conveyed by the image is not criminal; rather, the image itself presents a record of sexual abuse against any child participants. "We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection." *Ferber*, 458 U.S. at 764–65.

John was not charged with obscenity, and for good reason: he never shared, solicited, published, or otherwise disseminated his collages. (R281-283) Because John never disseminated these collages, he could not possibly be guilty of disseminating obscene materials even if the collages were ultimately found to be obscene. See 720 ILCS 5/11-20.1 (2018). Further, there would remain a genuine dispute as to whether his collages possessed redeeming literary, artistic, political or scientific value (which would preclude a finding of obscenity).

> "Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, applying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibition of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific value." *Miller*, 413 U.S. at 24.

John's collages were never shared with anyone; it is therefore impossible to determine whether they were shared in an appropriate context. (R282) John told detectives that the collages helped him cope with the fact that he was abused by an uncle when he was a child, and that the images represented the youthful innocence he had lost in the process. ("People's Ex 1" 0:25:40-0:26:25) If John had created the same collages in the course of a therapy session –

depicting what was done to him as a child in order to work through the related trauma – their redeeming value might become immediately apparent. See *Miller*, 413 U.S. at 24.

Rather than the crime of obscenity (for distributing offensive content), John was charged with the production of child pornography (based on the purported harm to the human models or actors used to create the images). (C39) See *Alexander*, 204 Ill. 2d at 486. Although the United States Supreme Court has never ruled on this particular application of 720 ILCS 5/11-20.1 (2018), its previous decisions provide the strict-scrutiny framework under which child pornography statutes must be evaluated. See, *e.g.*, *Ashcroft*, 535 U.S. at 245.

The United States Congress passed the Child Pornography Protection Act (CPPA) in 1996. *Id.*, at 239-240. Though the CPPA was enacted with the broad purpose of protecting children, it was unconstitutionally overbroad because it imposed criminal penalties for all sexually explicit materials advertised as containing, or appearing to contain, children. "The principal question to be resolved, then, is whether the CPPA is constitutional where it proscribes a significant universe of speech that is neither obscene under *Miller* nor child pornography under *Ferber*." *Id.* at 240. In some instances, the CPPA imposed criminal liability even where the evidence showed that no children had been directly involved in the images' production. *Id.* at 255-56.

The United States Supreme Court invalidated several provisions of the CPPA because they imposed overbroad content-based restrictions on speech without regard to whether the depicted events ever took place. "In contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not 'intrinsically related' to the sexual abuse of children, as were the materials in *Ferber*." *Id.* at, 250. Because other sections of the CPPA were not challenged, the Court declined to address the related question of whether the government could criminalize "morphed" child pornography: the use of computer imaging software to modify real images of adults having sex so that they appeared to be children. *Id.* at 242.

This Court had occasion to evaluate the Illinois child pornography statute in light of *Ashcroft* in *People v. Alexander*, 204 Ill. 2d 472 (2003). The Illinois statute's definition of a "child" was constitutionally deficient because it went "beyond morphing to attack the same virtual and pandered child pornography" which the United States Supreme Court had found to be protected by the First Amendment. *Id.* at 483. Unlike the provisions of the CPPA which survived *Ashcroft* (or the federal PROTECT Act which followed), Illinois's child pornography statute "does not refer to identifiable children, and, accordingly, does not proscribe computer morphing as defined by the Court." *Id.* at 482-83. In the context of the Illinois child pornography statute, "child pornography '[m]atter' means 'any photographic product depicting *actual human models or actors*[.]" *Id.* at 486 (emphasis in original).

720 ILCS 5/11-20.1 *et seq.* (2018) criminalizes the abuse of real children, not the cutting up and reassembling of magazines while alone in one's basement. *Id.* A child is a human being, while a magazine is a collection of photographs; a photograph of a child is not the same thing as an actual child.

> "Because we have concluded that the definition of 'child' in section 11–20.1(f)(7) is constitutionally infirm, we must resort to plain language. 'Child' means 'a young person of either sex esp. between infancy and youth.'* * * 'Person,' in turn, means 'an individual human being' or 'a human being as distinguished from an animal or thing.' * * *(child pornography '[m]atter' means 'any photographic product depicting *actual human models or actors*, whether in the form of still photographs, motion pictures, or videotape' (emphasis added)). 'Child' means young human being; child means actual child." *Alexander*, 204 Ill. 2d at 485–86 (Internal citations omitted, emphasis in original).

Both the trial court (R282) and the appellate court agreed that no children were present for the creation of John's collages. *McKown*, 2021 IL App (4th) 190660 at ¶ 67. John's collages (E7-19) did not use "actual human models or actors," and were therefore "virtual child pornography—child pornography produced without using actual children" *Alexander*, 204 Ill. 2d at 485-87. Here, the underlying facts were undisputed: as the prosecutor conceded below, the pictures of children used in John's collages "were cut out of magazines or advertisements, and there are images of penises and Mr. McKown put these pictures together." (R262)

In order to constitute child pornography, "[t]he portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera." *Williams*, 553 U.S. at 297. "[A]lthough the sexual intercourse may be simulated, it must involve actual children (unless it is obscene). This change eliminates any possibility that virtual child pornography or sex between youthful-looking adult actors might be covered by the term 'simulated sexual intercourse.'" *Id.* Because it is uncontested that "in this particular case, there were no children actually engaged in acts of child pornography" (R282), John's conviction for possession of child pornography must be reversed.

In a published decision, the appellate court has determined that "images of real, identifiable children that [are] combined with images of penises to depict acts of oral penetration * * * fall within the coverage of section 11-20.1[.]" *McKown*, 2021 IL App (4th) 190660 at ¶ 67. The appellate court has apparently reversed this Court's holding in *Alexander*, to hold that 720 ILCS 5/11-20.1 *et seq.* (2018) prohibits computer morphing and criminalizes any pornographic content including images of "identifiable children." *Id.*; *cf. Alexander*, 204 Ill. 2d at 482–83. ("The definition of 'child' in section 11–20.1(f)(7) * * * does not refer to identifiable children, and, accordingly, does not proscribe computer morphing as defined by the Court."). The appellate court could "see no basis for finding defendant's 'collages' do not pose the same type of reputational or emotional harm as more technologically sophisticated 'morphed' images." *McKown*, 2021 IL App (4th) 190660 at ¶ 66. However, such basis is readily apparent and a similar argument was refuted by the United States Supreme Court. "In contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the [statute as construed by the appellate court] prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not 'intrinsically related' to the sexual abuse of children, as were the materials in *Ferber*." *Ashcroft*, 535 U.S. at 250.

The United States Supreme Court, in *Ferber*, had "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment." *Ashcroft*, 535 U.S. at 251. Though the appellate court purported to rely on *Ferber*, it did not address the fact that the *Ferber* decision was based on the harm to child actors forced to participate in the creation of the criminalized materials. *McKown*, 2021 IL App (4th) 190660 ¶¶ 62-64. Actual child pornography is unprotected by the First Amendment explicitly because "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." *Ferber*, 458 U.S. at 759. "*Ferber*, then, not only referred to the distinction between actual and virtual child pornography, it relied on it as a reason supporting its holding. *Ferber* provides no support for a statute that eliminates the distinction and makes the alternative mode criminal as well." *Ashcroft*, 535 U.S. at 251.

The appellate court has apparently reversed this Court's determination that 720 ILCS 5/11-20.1 *et seq.* (2018) "does not refer to identifiable children, and, accordingly, does not proscribe computer morphing[.]" *Alexander*, 204 Ill. 2d at 482–83. The appellate court's construction of 720 ILCS 5/11-20.1 *et seq.* (2018) (as criminalizing "the 'morphed' images described but not addressed by *Ashcroft*") is directly contrary to this Court's prior holding. *McKown*, 2021 IL App (4th) 190660 at ¶ 63. "*Ashcroft* addressed only the question of whether a criminal prohibition of virtual child pornography—child pornography produced without using actual children—violated the first amendment. It did not invalidate all child pornography laws. We need not revisit the issue of whether criminalizing child pornography of actual, not virtual, children violates the first amendment. That issue was answered conclusively and convincingly in *Ferber*, and the Illinois child pornography statute comports with that case." *Alexander*, 204 Ill. 2d at 487.

Further, the appellate court's application of 720 ILCS 5/11-20.1 *et seq.* (2018) to wholly fictional collages has rendered the statute unconstitutionally overbroad almost by definition. "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter." *Ashcroft*, 535 U.S. at 255. "Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient, even on its own terms. It allows persons to be convicted in some instances where they can prove children were not exploited in the production." *Id.* at 256.

C. Any construction of 720 ILCS 5/11-20.1 *et seq.* (2018) under which a defendant can be convicted although it is undisputed that no children engaged in sexual activity for the images' creation renders the statute unconstitutionally overbroad.

Both the trial court (R282) and the appellate court found that no children were present during the creation of these collages. *McKown*, 2021 IL App (4th) 190660 at ¶ 56. This case is made unique by the undisputed fact that John's collages were not a recording of an actual event: no children engaged in any form of sexually explicit conduct for the collages' creation. (E7-19) A child pornography statute is unconstitutionally overbroad if it "provides no protection to persons who produce speech by using computer imaging, or through other means that do not involve the use of adult actors who appear to be minors.* * * In these cases, the defendant can demonstrate no children were harmed in producing the images, yet the affirmative defense would not bar the prosecution." *Ashcroft*, 535 U.S. at 256. "For this reason, [an] affirmative defense cannot save the statute, for it leaves unprotected a substantial amount of speech not tied to the Government's interest in distinguishing images produced using real children from virtual ones." *Id.*

The appellate court has held that, because the images used in John's collages were taken from magazines (and someone had to pose for the magazines), the collages involved the "morphing" of images of "real, identifiable children" in violation of 720 ILCS 5/11-20.1 *et seq.* (2018) *McKown*, 2021 IL App (4th) 190660 at ¶¶ 66-67. The appellate court relies on

a case (from the Northern District of New York) which involved the application of a federal statute with significantly different language. *Id.* at ¶¶ 62-67; *Hotaling*, 599 F. Supp. 2d at 312. The *Hotaling* court relied on the fact that the federal PROTECT Act separately prohibits images created using actual children and those "created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct." *Id.*; 18 U.S.C.A. § 2256(8)(C) (2020).

The *Hotaling* court concluded that the United States Supreme Court had upheld the PROTECT Act as criminalizing the use of any child, in any fashion, to create a sexually explicit image. *Hotaling*, 599 F. Supp. 2d at 316 (citing *Williams*, 553 U.S. at 297). Though this analysis seems to conflict with the cited authority, the United States Supreme Court has not yet revisited the issue.

> "'[S]imulated' sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera. Critically, unlike in *Free Speech Coalition*, [the PROTECT Act]'s requirement of a 'visual depiction of an actual minor' makes clear that, although the sexual intercourse may be simulated, it must involve actual children (unless it is obscene)." *Williams*, 553 U.S. at 297.

Because the *Ashcroft* Court did not rule on the question of whether "morphed" images could be criminalized as child pornography, the appellate court reasons, 720 ILCS 5/11-20.1 *et seq.* (2018) must criminalize any morphed images of identifiable children. See *id.* However, the appellate court's reliance on *Hotaling* is misplaced. *Cf. Hotaling*, 599 F. Supp. 2d at 312; *Williams*, 553 U.S. at 297. As this Court has previously held, the Illinois child pornography statute does not refer to morphed images. "Instead, [the overbroad definition of child in] section 11–20.1(f)(7) [went] beyond morphing to attack the same virtual and pandered child pornography" found to be constitutionally protected by the United States Supreme Court. *Alexander*, 204 Ill. 2d at 483. Notably, the Illinois legislature has not changed or expanded the definition of what constitutes child pornography following this Court's decision. *Id.*; 720 ILCS 5/11-20.1(f) *et seq.* (2022).

John's collages are exactly the sort of image deemed protected speech by *Ashcroft*, though they use slightly older-than-contemplated technology: they are readily distinguishable as having been cobbled together from magazine cut-outs. (E7-19) The prosecution conceded, and the trial court found, that the images did not depict sexually explicit activity by child actors. (R282) John's collages were created "through other means that [did] not involve the use of adult actors who appear to be minors[:]" by cutting images out of magazines (E7-19) and taping them together. *Ashcroft*, 535 U.S. at 256. John himself found his collages disturbing and repeatedly asked detectives to help him find a healthier way to process his own childhood trauma, however they are *collages* – unequivocally the product of John's imagination – and not a record of real events in the manner of a photograph or videotape. (E7-19; R282) "Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *Ashcroft*, 535 U.S. at 255.

John cut images out of magazines and taped them together; he never interacted with, photographed, or otherwise recorded real children. (E7-19) John's collages, though sexually explicit, constituted "virtual child pornography[:] child pornography produced without using actual children[.]" *Alexander*, 204 Ill. 2d at 487. Virtual pornography and other depictions of sexual conduct "which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection." *Ferber*, 458 U.S. at 765. John's collages are the very definition of protected virtual pornography, where both the prosecution and the court agreed that they are not a record of a live performance and no children engaged in any form of sexually explicit conduct for their creation. See, *e.g.*, *Ashcroft*, 535 U.S. at 254.

Any construction of 720 ILCS 5/11-20.1 *et seq*. (2018) which could be expanded to criminalize virtual child pornography such as John's collages would be unconstitutionally overbroad, in light of the uncontested fact that no children engaged in sexually explicit conduct for the images' creation. (R282) See *Ashcroft*, 535 U.S. at 255; *Alexander*, 204 Ill. 2d at 487.

The appellate court has effectively ruled that a picture of a child in a commercial magazine (originally non-sexual in nature) is the same thing as a real child for purposes of 720 ILCS 5/11-20.1(f)(7) (2018). *McKown*, 2021 IL App (4th) 190660 at ¶¶ 63-67. Because 720 ILCS 5/11-20.1 *et seq*. (2018) *cannot* constitutionally criminalize collages such as John's – where it is undisputed that no children engaged in sexually explicit conduct for the collages' creation – it *does not* criminalize John's collages. See, *e.g.*, *Ashcroft*, 535 U.S. at 254. Though the appellate court claims that it has affirmed John's conviction based on *Ferber*, its analysis is directly refuted by that case and its progeny: *Ferber* provides "no support for a statute that eliminates the distinction and makes the alternative mode criminal as well." *Ashcroft*, 535 U.S. at 236.

Under any constitutional construction of the word "child" as used in 720 ILCS 5/11-20.1 *et seq*. (2018), criminal liability cannot be imposed where it is undisputed that no children engaged in sexually explicit activity for the images' creation. *Ashcroft*, 535 U.S. at 255-56. Illinois's child pornography statute refers only to real children (human persons), not to objects such as photographs or magazines. "'Child' means young human being; child means actual child." *Alexander*, 204 Ill. 2d at 486. Based on the uncontested fact that no actual children engaged in sexually explicit conduct for the creation of John's collages (R282), he is not guilty as a matter of law. Therefore, this Court should reverse John's conviction for possession of child pornography and correct the appellate court's misapplication of 720 ILCS 5/11-20.1 *et seq*. (2018).

II.

The *corpus delicti* rule bars conviction for predatory criminal sexual assault and aggravated criminal sexual abuse as alleged in Counts I and V, respectively, where J.M.'s testimony did not relate to the specific events described in John McKown's inculpatory statement to police.

The trial court found that J.M.'s testimony – coupled with his contradictory statements during two recorded interviews – was materially inconsistent in several ways. (R281-283) Where J.M.'s testimony was the only evidence in support of a particular charge, the court found that it was bound by the *corpus delicti* rule and required to enter judgments of acquittal. "As to the guilty counts, the defendant's admissions were obviously very important, if not critical, to the State's case." (R283) The trial court erred when it relied on the fact that John had made entirely uncorroborated incriminating statements as evidence of his guilt for Counts I and V. (R281-283) Because a defendant's uncorroborated incriminating statements cannot be considered at trial for any purpose, and because J.M.'s contradictory testimony was explicitly insufficient to support a conviction, the evidence was insufficient to establish John's guilt beyond a reasonable doubt. Therefore, this Court should reverse John's convictions for predatory criminal sexual assault of a child (Count I) and aggravated criminal sexual abuse (Count V). (C22, 51)

A. Standard of Review

In reviewing a challenge to the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (Emphasis in original). "The *corpus delicti* of an offense is simply the commission of a crime. Along with the identity of the person who committed the offense, it is one of two propositions the State must prove beyond a reasonable doubt to obtain a valid conviction." *People v. Lara*, 2012 IL 112370, ¶ 17.

B. The trial court misapplied the *corpus delicti* rule by considering John's uncorroborated incriminating statement as evidence of his guilt for the charged offenses.

The trial court identified substantial reasonable doubt as to John's guilt for the charged offenses; ultimately it was convinced only that "something bad happened to" J.M. (R281) J.M. had clearly perjured himself when he denied accusing Cheryl McKown of "butt-fucking [him] with a dildo" (persisting in the lie even when confronted with his recorded statement), and he provided unsatisfactory answers to several other questions. (R106-131) The child, now twelve years old, had even pretended not to know the word for "semen" during his testimony despite volunteering that information at the beginning of his first interview. (R120-121; "People's Ex 9" 0:04:40-0:05:05) Because of the inconsistencies in J.M.'s various stories, the trial court was unable to determine beyond a reasonable doubt "where it occurred, the number of times it occurred, the people who were present when it occurred, what occurred, whether grandma was involved in the process, whether threats were made, and so on and so forth." (R281) "The inconsistencies account for the not guilty verdicts[.]"(R281) "As to the guilty counts, the defendant's admissions were obviously very important, if not critical, to the State's case." (R282)

Under the *corpus delicti* rule, however, John's incriminating statements could not be considered as evidence of his guilt unless the events described in those statements could be corroborated in some way. "Where a defendant's confession is part of the proof of the *corpus delicti*, the prosecution must also adduce corroborating evidence independent of the defendant's own statement.* * * If a confession is not corroborated in this way, a conviction based on the confession cannot be sustained." *People v. Sargent*, 239 Ill. 2d 166, 183 (2010). "Our precedent demonstrates that under the corroboration rule, the independent corroborating evidence must relate to the specific events on which the prosecution is predicated." *Id.* at 185. It is not sufficient

for a defendant to confess to an offense *similar* to the one police are investigating. "Correspondingly, where a defendant confesses to multiple offenses, the corroboration rule requires that there be independent evidence tending to show that defendant committed each of the offenses for which he was convicted." *Id.* "The true rule is that i[f] there is evidence of corroborating circumstances which tend to prove the *corpus delicti* and correspond with the circumstances related in the confession, both the circumstances and the confession may be considered in determining whether the *corpus delicti* is sufficiently proved in a given case." *People v. Perfecto*, 26 Ill. 2d 228, 229 (1962).

Courts must ensure that the *circumstances* related in the confession are corroborated: that the events described in the confession actually happened. "By not requiring corroboration of every element, or any one particular element, our interpretation of the *corpus delicti* rule supports the fact finder's role. Simultaneously, it permits the trial court to perform its proper legal function of ensuring the legal sufficiency of the corroborating evidence presented by the State because the corroboration must still 'tend [ ] to connect the defendant with the crime.'" *Lara*, 2012 IL 112370 at ¶ 50 (Citing *Perfecto*, 26 Ill. 2d at 229). "[T]he evidence corroborating the confession 'must consist of facts or circumstances, appearing in evidence, independent of the confession, and consistent therewith, tending to confirm and strengthen the confession.'" *People v. Lueder*, 3 Ill. 2d 487, 489 (1954). Absent such corroboration, the defendant's incriminating statement is presumptively unreliable and may not be considered as evidence of guilt. See *Lara*, 2012 IL 112370 at ¶ 47.

Both the trial court (R283) and the appellate court decided that John's incriminating statements were reliable based on their findings that the statements had not been coerced. *People v. McKown*, 2021 IL App (4th) 190660, ¶ 54. However, courts are not tasked with determining whether police coerced the defendant into making the confession: the courts'

determination that John's statement was not coerced by detectives is entirely irrelevant here. "Experience has shown that untrue confessions may be given to gain publicity, to shield another, to avoid apparent peril, or for other reasons, and because of this, the law demands corroborating proof that a crime did in fact occur before the individual is punished therefor." *People v. O'Neil*, 18 Ill. 2d 461, 464 (1960). "A great variety of facts usually attend, or are incidentally connected with, the commission of every crime. Proof of any number of these facts and circumstances, consistent with the truth of the confession, or which the confession has led to the discovery of, and which would not probably have existed had the crime not been committed, necessarily corroborate it, and increase the probability of its truth." *Bergen v. People*, 17 Ill. 426, 428–29 (1856).

The trial court erred when it found that John's incriminating statements to detectives on January 24, 2018, were corroborated by any independent evidence. (R283) There was no evidence to suggest that J.M. ever asked John about anal sex, nor that J.M. pulled down his pants and exposed his anus to John (as John's story described). ("People's Ex 2" 0:17:40-0:24:15) In fact, J.M. denied ever being in John's man cave (the setting described in John's statement) when John was home; J.M. insisted that any inappropriate contact happened in the bathroom of the McKown home. (R123-124)

J.M.'s allegations – explicitly insufficient to support a conviction on their own (R281-283) – described entirely different events than John's incriminating statement. J.M. described a series of encounters in the bathroom, where he alleged that John pushed him up against the wall, put his "thing" in J.M.'s butt while wearing an "extender," then "put it in and out." ("People's Ex 9" 0:07:30-0:08:35; R) J.M. quickly volunteered this information at the beginning of his interview but could provide little other detail; later, he would provide a much more detailed account of the abuse his sister K.M. had suffered at the hands of their mother's boyfriend. ("People's Ex 9" 0:19:45-0:22:20) J.M.'s demeanor was wholly inconsistent with his allegations

while describing the alleged abuse by John; he showed no emotional attachment to the alleged events, such as one might expect of someone reliving a genuine childhood trauma. ("People's Ex 9" 0:07:30-0:08:35)

In his second interview with Ms. Johnson, J.M. laughed as he described being beaten with a belt; to describe how the belt might have been used, he said "like a whip or something. Like have you ever seen a Catwoman movie?" Both the lack of consistency to J.M.'s various stories and his apparent detachment from the subject matter indicate that his allegations are at least partially fabricated. See *People v. Simpkins*, 297 Ill. App. 3d 668, 678 (4th Dist. 1998). The limited details J.M. did provide (including the apparently incongruous reference to Disneyland) most likely originated from Brian McKown's daily explanation (to a six-year-old J.M.) of the forcible sodomy Brian had suffered as a teen. (R243-245)

The circumstances of Brian and Jacqueline McKown's divorce also raised questions about the origins of J.M.'s allegations. (R142-147) Even during his initial statement, J.M. spoke as if he had discussed the abuse K.M. suffered at some length with his mother. "Now it all makes sense, because [Benny was] my mom's boyfriend, and he stopped doing what he did with her. * * * We knew something was just wrong." ("People's Ex 9" 0:21:38-0:22:20) J.M. provided a detailed description of the ligature marks left on K.M.'s wrists by leather restraints after Benny had abused her. "We thought [K.M.] was pregnant by Benny. Do you know what bondage straps are?" ("People's Ex 9" 0:19:45-0:20:00) By contrast, J.M. provided very little detail as to the alleged abuse he had suffered in the McKown bathroom. "I was molested, just like my sister was." ("People's Ex 9" 0:03:45-0:06:25)

In his second interview, J.M. laughed as he alleged that John had beaten him with a belt; he repeated disparaging terms for the McKowns that an embittered divorcee might use. "[N]ow I personally think he was stupid doing that, 'cause he only - he used a cheap belt! But the McKown family is cheap. They get all this money and then they go to food banks.

They're bedbug infested, gross. They make me sick." ("Defendant's Ex 1" 0:31:50-0:32:05) Similarly, J.M. testified that his father was "usually out in the bar or something;" "[b]ecause he was always drinking," which J.M. knew because "he always has a bottle in his hand." (R130) While Jacqueline McKown testified that she did not talk negatively about the McKown family in front of her children, the credibility of that assertion is undermined where she did so while volunteering that Brian McKown was an alcoholic and "not mentally an adult." (R146-147)

In October of 2018, J.M. informed Ms. Johnson that his mother and maternal grandmother had helped him "remember" the allegations against Cheryl McKown in response to J.M. saying "grandma" while he was playing video games. ("Defendant's Ex 1" 0:25:25-0:26:26) J.M.'s conflicting allegations suffered from many outside influences, including: exposure to too much information about K.M.'s abuse; the "help" of J.M.'s mother and grandmother in "remembering" the substance of his allegations; and Brian McKown's daily, detailed account of his own childhood trauma. (R244) All of these issues and more led the trial court to determine that J.M.'s testimony – on its own – was insufficient to support a conviction as to any count. "And if the State's case was solely based on [J.M.]'s testimony, I think we would be in a much different position today than where Mr. McKown finds himself." (R281)

The trial court correctly determined that, although J.M.'s testimony was too unreliable to support a conviction on its own, the State's case could still be proven if J.M.'s testimony could be considered alongside John's incriminating statement. (R282-283) However, John's statement could not be considered as evidence of guilt unless the State presented some evidence to show that the circumstances related in that statement actually took place. "What is necessary are facts or circumstances independent of the confession, and consistent therewith, tending to confirm and strengthen the confession." *Lara*, 2012 IL 112370 at ¶ 42 (Internal quotations and emphasis omitted). In other words, before the trial court was allowed to consider John's incriminating statement as evidence of his guilt, the State was required to present some evidence that the events *described in John's statement* actually happened. *Id.*

Even if J.M.'s story had been consistent and detailed, and if there had been no indication of outside influence, J.M. described a completely different scenario than the one in John's incriminating statement to detectives on January 24, 2018.("People's Ex 2" 0:17:40-0:19:18) J.M. was consistent about very little, but the one thing he was adamant about was that all abuse took place in the bathroom of the McKown family home and not in the basement: he explicitly testified that the encounters described by John did not happen. (R106-109, 116) In his statement to detectives on January 24, 2018, John described a single incident during which he claimed that J.M. had come into the basement and asked John what anal sex might feel like. ("People's Ex 2" 0:17:40-0:19:18) John's description of events was clearly delusional: no reasonable person would believe that the young J.M. had asked such questions, let alone disrobed himself and bent over in front of his grandfather. ("People's Ex 2" 0:17:40-0:19:18) More importantly, there is absolutely no evidence that John *ever* had an encounter with J.M. in the basement of his home: as the trial court explained regarding Count VI, J.M. "said it never happened. The defendant said it did happen. That is all the testimony. I can't make a finding of beyond a reasonable doubt based on those two statements." (R281)

Ultimately, the trial court determined that John was guilty of Counts I, IV, and V, because he had admitted to conduct similar to that alleged by J.M. (R281-283) It found that the "physical evidence that was found in the defendant's basement, I think, also corroborates his statements that he violated [J.M.]" (R283) No such evidence was discovered in John's basement, and the court did not specify to which items it was referring; however it did explicitly find that there had been no evidence of the penis extender, the electronic tablet, or the "kiddie porn" videos described in J.M.'s allegations. (R281-282) Nor could the fact that John amended his story (at detectives' insistence) to match the elements of J.M.'s allegations be conclusive. "[C]orroboration is sufficient to satisfy the *corpus delicti* rule if the evidence, or reasonable inferences based on it, tends to support the commission of a crime that is at least closely related to" the crime to which a defendant has confessed. *Lara*, 2012 IL 112370 at ¶ 45.

In order to evaluate this evidence, the trial court was required to consider the events described in John's incriminating statement and then determine whether any independent evidence had been submitted which tended to confirm that those events ever took place. See *id.* A corroborated confession to one instance of sexual abuse does not constitute a confession to other instances of sexual abuse (even if they contain identical elements). "[U]nder the corroboration rule, the independent corroborating evidence must relate to the specific events on which the prosecution is predicated. Correspondingly, where a defendant confesses to multiple offenses, the corroboration rule requires that there be independent evidence tending to show that defendant committed each of the offenses[.]" *Sargent*, 239 Ill. 2d at185. While there may be circumstances in which evidence of one act can corroborate a confession to a different act, this will only be true where "the corroborating evidence establishe[s] a high degree of similarity between the two incidents, with both involving the same victim, part of the body, *circumstances, location, and time*." *Lara*, 2012 IL 112370 at ¶ 59 (emphasis added). If a defendant confesses to dozens of incidents of a particular type of sexual abuse, but the evidence only corroborates one instance, only one conviction can be sustained. *Sargent*, 239 Ill. 2d at 187.

Here, the circumstances described by John and those described by J.M. were completely different: J.M. described a series of encounters in the first-floor bathroom of the McKown home. (R106-109, 116) During his first interview, J.M. claimed that John would enter the bathroom while J.M. was relieving himself or taking a bath. ("People's Ex 9" 0:04:03-0:07:10) J.M. alleged that John would push him up against the wall, put his penis in J.M.'s butt, and then "like push it in and out;" semen would come out "like throughout the thing." ("People's Ex 9" 0:07:30-0:08:35) However, J.M. never alleged any inappropriate contact with John in his basement "man cave." When questioned about this discrepancy at trial, J.M. explicitly testified that he had never been in the basement at the same time as John. (R114-115)

John repeatedly denied any inappropriate contact with J.M., and was repeatedly informed by detectives that his story needed to be more similar to J.M.'s allegations. ("People's Ex 1;" "People's Ex 2" 0:01:00-0:17:25) Either John could tell a story in which J.M. asked him for instruction (and John's penis and semen touched J.M.'s buttocks), or the judge and jury would be left to presume that John was a "monster." ("People's Ex 2" 0:12:57-0:17:25) John did, eventually, tell such a story, providing a patently delusional description of J.M. entering the "man cave" area of the basement after John had finished masturbating and soliciting anal sex. ("People's Ex 2" 0:17:40-0:24:15) However, John's obviously made-up story was inherently unreliable; without some corroboration of the events described in his statement, that statement could not be considered as evidence of guilt. See, *e.g.*, *Sargent*, 239 Ill. 2d at 183.

At the hearing on John's motion for new trial, the court stated that "the counts to which Mr. McKown was found guilty were all counts where [J.M.] indicated something had occurred, and then by the defendant's own statement he confessed or corroborated the same behavior." (R293-294) It found John guilty under Count I, which alleged that "the defendant placed his penis in the anus of J.M." (R283; C51) It also found John guilty of Counts IV and V, which alleged that "the defendant placed had J.M. placed [*sic*] his hand on the defendant's penis[,]" and that John "transferred his semen to the buttocks of J.M.[,]" respectively. (R283; C21-22) According to the trial court, these convictions were supported because the same general type of contact had been described in John's incriminating statement and in J.M.'s testimony. (R293-294)

J.M. alleged that, when he was between six and eleven years old, he had been sexually abused by John on a regular basis (R117) J.M. alleged that, each time, John would come into the first-floor bathroom of the McKown home while J.M. was relieving himself or taking a bath. (R105-107) J.M. claimed that John would "put his penis in [J.M.'s] butt and, like, take

it in and out[.]" (R106) When John was done, J.M. testified, he would have to wipe away "sticky stuff." (R107, 120-121) When asked if John had ever touched his penis, J.M. said that John would "hold it and stuff" while his penis was in J.M.'s butt. (R109-111) J.M. also alleged that John placed his penis in J.M.'s mouth between one and ten times, but that J.M. bit John and he never tried again. (R107-109, 122-123) J.M. testified that no other part of his body had ever touched John's penis. (R109) J.M. also testified that he had never been in John's basement area at the same time as John. (R114-115)

John informed detectives that J.M. had, on three occasions, entered John's basement "man cave" after John had finished masturbating. ("People's Ex 1" 1:33:10-1:35:30; "People's Ex 2" 0:05:15-0:24:15) The first time, he said, J.M. had grabbed his penis and asked "what's this?" before John could extricate himself. ("People's Ex 1" 1:33:10-1:35:30) Another time, John claimed, he and J.M. had touched each other's penises while John taught J.M. how to masturbate. ("People's Ex 2" 0:05:15-0:10:08) The last time, John claimed that J.M. walked up, asked what anal sex might feel like, pulled down his own shorts and underwear, and then bent over in front of John. ("People's Ex 2" 0:17:40-0:18:23) John said that he had rubbed his penis between J.M.'s buttocks for a few seconds, then stopped. ("People's Ex 2" 0:18:25-0:19:18) According to John, this was the only time his penis or semen could have touched J.M.'s buttocks. ("People's Ex 2" 0:19:20-0:23:30) John denied any other inappropriate contact with J.M., and said these incidents had happened exclusively in the basement, never the bathroom. ("People's Ex 2" 0:23:15-0:24:15)

Here, the only points of similarity between J.M.'s testimony and John's statement were the fact that both alleged contact between John's penis or semen and J.M.'s buttocks, and both tales were set generally in the McKown home. (Deft Br 19-29) Moreover, John's account was crafted in response to detectives' post-arrest demands that he tell a story in which his penis

and semen made contact with J.M.'s butt. ("People's Ex 2" 0:01:00-0:05:15) Even so, John's statement did not describe circumstances remotely similar to those in J.M.'s testimony. (R98-140; "People's Ex 2" 0:17:40-0:24:15) Because J.M. *denied* John's account of inappropriate contact in the basement, rather than corroborating the events therein, there was absolutely no evidence to corroborate John's statements. The court was left only with the testimony of J.M., which was an explicitly insufficient basis to support a conviction on its own; it erred in convicting John on any count. (R281-283)

C. The appellate court misapplied the *corpus delicti* rule when it held that an uncorroborated incriminating statement may be used to bolster otherwise-incredible witness testimony.

The appellate court reversed John's conviction under Count IV, which had alleged that J.M.'s hand touched John's penis. *McKown*, 2021 IL App (4th) 190660 ¶¶ 36- 54. It found that there was absolutely no evidence of such contact, where J.M. explicitly denied that any part of his body other than his mouth or buttocks touched John's penis. *Id.* In affirming John's convictions for Counts I and V, the appellate court stated "the [trial] court's comments reflect that it found J.M's testimony credible, particularly where corroborated by defendant's admissions to police." *McKown*, 2021 IL App (4th) 190660 at ¶53. However, such analysis undermines the rule on *corpus delicti* by misapprehending the "corroboration" requirement: while the allegedly corroborating evidence need not match the confession in every detail, it must be sufficient to ensure the court "that the confession was not fabricated out of whole cloth." *Lara*, 2012 IL 112370 at ¶ 63.

A defendant's incriminating statement may not be considered as evidence of their guilt unless the details of that statement can be sufficiently corroborated. See *id.* Under no circumstances may the fact that a defendant eventually confessed to an offense *similar* to the charged offense be considered as evidence of guilt for the charged offense. See *Sargent*, 239 Ill. 2d at 185. Without some indication that the encounter described in John's incriminating

statement actually took place, John's statement was uncorroborated, unreliable, and unable to be considered as evidence of guilt. See, *e.g.*, *id.* However, that is exactly what happened here: in the judge's own words, "the defendant's statements were obviously very important, if not critical to the State's case." (R282)

The appellate court endorsed the approach pursued by the trial court, distorting the rule on *corpus delicti* to hold that a trier of fact may consider the mere fact that a defendant made an incriminating statement as evidence of guilt. "We find defendant's admissions supported J.M.'s statements regarding the specific sexual acts alleged in counts I and V." *McKown*, 2021 IL App (4th) 190660 at ¶ 54. In this published decision, the appellate court has held that trial courts are allowed to consider an uncorroborated incriminating statement for the purpose of bolstering otherwise-incredible witness testimony: it has effectively broadened the specific corroboration requirement of the *corpus delicti* rule so that it may be satisfied by any vague similarity between the defendant's statement and the allegedly corroborating evidence. *Id.*

John McKown's incriminating statement to detectives on January 24, 2018, was both delusional and entirely uncorroborated. (Appellant's Brief p. 27-29) No independent evidence was presented to show that J.M. was ever in the basement at the same time as John, let alone that any inappropriate contact happened there; J.M. denied being in the basement "man cave" with John at any time, ever. (R114-115) Because there was no corroboration of *any* of the details of John's statement, that statement could not be considered as evidence of guilt. See, *e.g.*, *Sargent*, 239 Ill. 2d at 185.

The appellate court's determination – that the mere fact John made an incriminating statement could corroborate unreliable testimony as to entirely separate allegations – holds no basis in the law and is refuted by this Court's previous decisions. "There is nothing, save the confession alone, which suggests or tends to corroborate" John's claim that his penis touched J.M.'s rectum when J.M. entered John's "man cave," disrobed himself, and bent over in front

of John. See *Lueder*, 3 Ill. 2d at 489. "[T]herefore, in the absence of any evidence [or] other facts or circumstances so fully corroborating the confession as to show the commission of the offense beyond a reasonable doubt, the rule that the *corpus delicti* cannot be proved by the confession of a defendant alone must be applied." *Id.* at 489-490.

For the foregoing reasons, and because J.M.'s testimony alone was explicitly insufficient basis for a conviction (R281-283), this Court should reverse John McKown's convictions for predatory criminal sexual assault of a child under Count I and aggravated criminal sexual abuse under Count V. Additionally, to remedy any confusion created by the appellate court's published decision (holding that uncorroborated incriminating statements can be used to corroborate other testimony), this Court should once again clarify the *corpus delicti* rule.

CONCLUSION

For the foregoing reasons, Petitioner-Appellant John T. McKown respectfully requests that this Court reverse his convictions on all counts.

Respectfully submitted,

CATHERINE K. HART
Deputy Defender

BRYAN JW MCINTYRE
Assistant Appellate Defender
Office of the State Appellate Defender
Fourth Judicial District
400 West Monroe Street, Suite 303
Springfield, IL 62704
(217) 782-3654
4thdistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER-APPELLANT

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is forty-seven pages.

/s/Bryan JW McIntyre
BRYAN JW MCINTYRE
Assistant Appellate Defender

APPENDIX TO THE BRIEF

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
MACON COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-19-0660
	)	Circuit Court No: 2018CF136
	)	Trial Judge: Thomas Griffith
v	)	
	)	
	)	
MCKOWN, JOHN T	)	
Defendant/Respondent	)	

COMMON LAW RECORD - TABLE OF CONTENTS

Page 1 of 3

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
MACON COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-19-0660
	)	Circuit Court No: 2018CF136
	)	Trial Judge: Thomas Griffith
v	)	
	)	
	)	
MCKOWN, JOHN T	)	
Defendant/Respondent	)	

COMMON LAW RECORD - TABLE OF CONTENTS

Page 2 of 3

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
MACON COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-19-0660
	)	Circuit Court No: 2018CF136
	)	Trial Judge: Thomas Griffith
v	)	
	)	
	)	
MCKOWN, JOHN T	)	
Defendant/Respondent	)	

COMMON LAW RECORD - TABLE OF CONTENTS

Page 3 of 3

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
MACON COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-19-0660
	)	Circuit Court No: 2018CF136
	)	Trial Judge: Thomas Griffith
v	)	
	)	
	)	
MCKOWN, JOHN T	)	
Defendant/Respondent	)	

SUPPLEMENT TO THE COMMON LAW RECORD - TABLE OF CONTENTS

Page 1 of 1

Date Filed	Title/Description	Page No
07/24/2019	JUDGMENT-SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS	SUP C 4 - C4

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
MACON COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-19-0660
	)	Circuit Court No: 2018CF136
	)	Trial Judge: Thomas Griffith
v	)	
	)	
	)	
MCKOWN, JOHN T	)	
Defendant/Respondent	)	

COMMON LAW RECORD - TABLE OF CONTENTS

Page 1 of 1

SEC C 3

Report of Proceedings

E-FILED
Transaction ID: 4-19-0660
File Date: 12/3/2019 1:57 PM
Carla Bender, Clerk of the Court
APPELLATE COURT 4TH DISTRICT

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
MACON COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-19-0660
	)	Circuit Court No: 2018CF136
	)	Trial Judge: Thomas Griffith
v	)	
	)	
	)	
MCKOWN, JOHN T	)	
Defendant/Respondent	)	

EXHIBITS - TABLE OF CONTENTS

Page 1 of 1

Party	Exhibit #	Description/Possession	Page No
Defendant	1	DVD INTERVIEW OF CHILD - SENT VIA CERTIFIED M	E 2 - E 2
People	1	DVD MCKOWN INTERVIEW - SENT VIA CERTIFIED MAI	E 3 - E 3
People	1A	DVD EDITED VERSION - SENT VIA CERTIFIED MAIL	E 4 - E 4
People	3	PEOPLE'S EXHIBIT NOS. 3-4/17/2019	E 5 - E 5
People	4	PEOPLES EXHIBIT#4-4/17/2019	E 6 - E 7
People	5	EXHIBIT 5,-4/17/2019	E 8 - E 9
People	6	EXHIBIT 6-4/17/2019	E 10 - E 11
People	7	SUBPARAGRAPHS OF 7-4/17/2019	E 12 - E 19
People	7	PEOPLE'S EXHIBIT #7-4/17/2019	E 20 - E 20
People	8	DVD DETECTIVE ASKED DEFENDANT TO PLAY; LIST O	E 21 - E 21
People	9	DCD INTERVIEW - SENT VIA CERTIFIED MAIL ON 12	E 22 - E 22
People	10	PEOPLE'S EXHIBIT #10-4/2/2019	E 23 - E 23
People	11	PEOPLE'S EXHIBIT #11-4/2/2019	E 24 - E 24
People	12	EXHIBIT #12-4/2/2019	E 25 - E 25

IN THE CIRCUIT COURT OF MACON COUNTY, ILLINOIS
SIXTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS)
) Case No. 18 CF 136
vs.)
)
JOHN T. MCKOWN,)
)
Defendant.)

Date of Sentence July 22, 2019
Date of Birth March 30, 1949
(Defendant)

JUDGMENT - SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

WHEREAS the above-named defendant has been adjudged guilty of the offenses enumerated below; IT IS THEREFORE ORDERED that the defendant be and hereby is sentenced to confinement in the Illinois Department of Corrections for the term of years and months specified for each offense.

COUNT	OFFENSE	DATE OF OFFENSE	STATUTORY CITATION	CLASS	SENTENCE	MSR
I	Predatory Criminal Sexual Assault of a Child	Between May 5, 2012 and July 31, 2017	720 5/11-1.40 (a)(1)	X	15 Yrs. -0- Mos.	3 Yrs. to Life
	To be served at 85% pursuant to 730 ILCS 5/3-6-3					
IV	Aggravated Criminal Sexual Abuse	Between May 5, 2012 and July 31, 2017	720 5/11-1.60 (c)(1)(i)	2	5 Yrs.-0- Mos.	2 Yrs.
	To run consecutively to Count I and to be served at 50% pursuant to 730 ILCS 5/3-6-3					
V	Aggravated Criminal Sexual Abuse	Between May 5, 2012 and July 31, 2017	720 5/11-1.60(c)(1)(i)	2	5 Yrs. -0- Mos.	2 Yrs.
	To run consecutively to Count I and concurrently with Count IV and to be served at 50% pursuant to 730 ILCS 5/3-6-3					
VII	Child Pornography	Between January 1, 2016 and January 15, 2018	720 5/11-20.1(a)(1)(ii)	3	3 Yrs.-0- Mos.	1 Yr.
	To run consecutively to Count I and concurrently with Counts IV and V and to be served at 50% pursuant to 730 ILCS 5/3-6-3					

This Court finds that the defendant is:
_____ Convicted of a class ___ offense but sentenced as a Class X offender pursuant to 730 ILCS 5/5-4.5-95(b).

__X__The Court further finds that the defendant is entitled to receive credit for time actually served in custody from January 24, 2018 through July 21, 2019. The defendant is entitled to receive credit for the time served in custody from the date of this order until defendant is received at the Illinois Department of Corrections.

_____The Court further finds that the conduct leading to conviction for the offenses enumerated in counts _____resulted in great bodily harm to the victim. (730 ILCS 5/3-6-3(a)(2)(iii)).

_____ The Court further finds that the defendant meets the eligibility requirements for possible placement in the Impact Incarceration Program. (730 ILCS 5/5-4-1(a)).

_____The Court further finds that offense was committed as a result of the use of, abuse of, or addiction to alcohol or a controlled substance and recommends the defendant for placement in a substance abuse and mental health program. (730 ILCS 5/5-4-1(a).

_____The defendant successfully completed a full-time (60-day or longer) Pre-Trial Program ____Educational/Vocational ___ Substance Abuse ___ Behavior Modification ___ Life Skills ___ Re-Entry Planning – provided by the county jail while held in pre-trial detention prior to this commitment and is eligible for sentence credit in accordance with 730 ILCS 5/3-6-3(a)(4). THEREFORE IT IS ORDERED that the defendant shall be awarded additional sentence credit as follows: total number of days in identified program(s)_____x 1.50 (1.25 for program participation before August 11, 1993) = _____days, if not previously awarded.

_____The defendant passed the high school level test for General Education and Development (GED) on _____ while held in pre-trial detention prior to this commitment and is eligible to receive Pre-Trial GED Program Credit in accordance with 730 ILCS 5/3-6-3(a)(4.1). THEREFORE IT IS ORDERED that the defendant shall be awarded 60 days of additional sentence credit, if not previously awarded.

____ IT IS FURTHER ORDERED the sentence imposed on Count ___ shall run concurrently with the sentence imposed in _____ County Case No. _____.

_____ IT IS FURTHER recommended that _____.

The Clerk of the Court shall deliver a certified copy of this order to the Sheriff. The Sheriff shall take the defendant into custody and deliver defendant to the Department of Corrections which shall confine said defendant until expiration of this sentence or until otherwise released by operation of law.

This order is (__X__effective immediately) (_____stayed until _____).

DATE: July 24, 2019

ENTER: _____
Thomas E. Griffith, Circuit Judge

SUP C 4

No. 4-19-0660

IN THE

APPELLATE COURT OF ILLINOIS

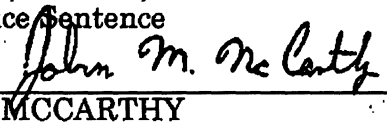
FOURTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- JOHN T. McKOWN, Defendant-Appellant.	)	Appeal from the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois No. 18-CF-136 Honorable Thomas E. Griffith, Judge Presiding.

AMENDED NOTICE OF APPEAL

An appeal is taken to the Appellate Court, Fourth Judicial District:

Appellant(s) Name:	Mr. John T. McKown
Appellant's Address:	Big Muddy River Correctional Center 251 N. Illinois Highway 37 Ina, IL 62846
Appellant(s) Attorney:	Office of the State Appellate Defender
Address:	400 West Monroe Street, Suite 303 Springfield, IL 62704
Offense of which convicted:	Predatory Criminal Sexual Assault, Two Counts of Aggravated Sexual Abuse, and Unlawful Possession of Child Pornography
Date of Judgment or Order:	September 12, 2019
Sentence:	15 years, two terms of 5 years, and 3 years in the Illinois Department of Corrections
Nature of Order Appealed:	Conviction, Sentence, and Denial of Motion to Reconsider and Reduce Sentence



JOHN M. MCCARTHY
Deputy Defender
ARDC No. 6216508
Office of the State Appellate Defender
400 West Monroe Street, Suite 303
Springfield, IL 62705-5240
(217) 782-3654
4thdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

2021 IL App (4th) 190660

NO. 4-19-0660

FILED
August 23, 2021
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOHN T. McKOWN, Defendant-Appellant.	)	Appeal from the Circuit Court of Macon County No. 18CF136 Honorable Thomas E. Griffith Jr., Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court, with opinion.
Justices Turner and Cavanagh concurred in the judgment and opinion.

OPINION

¶ 1 Following a bench trial, defendant, John T. McKown, was found guilty of one count of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2016)), two counts of aggravated criminal sexual abuse (id. § 11-1.60(c)(1)(i)), and one count of possessing child pornography (id. § 11-20.1(a)(6)). The trial court sentenced him to a total of 20 years in prison. Defendant appeals, arguing his convictions for the contact sex offenses were obtained in violation of the corpus delicti rule and the State's evidence was insufficient to establish his guilt beyond a reasonable doubt of those offenses. Defendant also argues his child pornography conviction must be reversed because it was based on his possession of material that cannot constitutionally be deemed child pornography. We affirm in part and reverse in part.

¶ 2 I. BACKGROUND

¶ 3 In January 2018, the State charged defendant with three counts of predatory criminal sexual assault of a child (id. § 11-1.40(a)(1)) and two counts of aggravated criminal sexual abuse (id. § 11-1.60(c)(1)(i)). It later added a third count of aggravated criminal sexual abuse (id.) and one count of child pornography (id. § 11-20.1(a)(1)(ii)). The charges were based on allegations that between May 2012 and July 2017, defendant sexually abused J.M., his grandson. Specifically, the State alleged defendant placed his penis and "an object" in J.M.'s anus (counts I and III), defendant placed his penis in J.M.'s mouth (count II), J.M.'s hand touched defendant's penis (count IV), defendant transferred his semen onto J.M.'s buttocks (count V), and defendant placed his hand on J.M.'s penis (count VI). In connection with the child pornography count (count VII), the State alleged defendant "knowingly depicted or portrayed by *** visual medium or reproduction a child *** under the age of 13 where such child was actually or by simulation portrayed or depicted and which involved the mouth of the child and the sex organ of another person."

¶ 4 In April and May 2019, the trial court conducted defendant's bench trial. The State's evidence showed J.M. was born on May 5, 2006. His parents, Jacqueline and Brian M., were divorced. After their separation in 2009, Brian began living with his mother, Cheryl, and his father, defendant, in Decatur, Illinois. J.M. and his older sibling, K.M., primarily resided with Jacqueline but would visit and stay with Brian at his parents' home. K.M. did not visit as often as J.M. because she had autism and Brian and his parents "couldn't handle her conditions." From May to July 2017, J.M. stayed with Brian at defendant and Cheryl's residence. In October 2017, J.M. disclosed that defendant sexually abused him. His disclosure occurred shortly after K.M.

disclosed that she was abused by Jacqueline's ex-boyfriend.

¶ 5 At the time he testified at trial, J.M. was 12 years old. He recalled visiting Brian at his grandparent's house and stated defendant began sexually abusing him when he was about six years old. The abuse included defendant "put[ting] his penis in [J.M.'s] butt" while they were in the bathroom of defendant's house. J.M. recalled feeling a "sticky" substance on his butt that came from defendant and stated he would clean it off with toilet paper. He denied knowing what the substance was. J.M. testified defendant anally penetrated him "[a] lot," i.e., every time he was at defendant's house. Sometimes, defendant would hit him if he did not do what defendant wanted. The last time that activity occurred was during the summer of 2017, which was also the last time J.M. was at defendant's house.

¶ 6 J.M. also testified that about 10 times, defendant "forced" his penis inside J.M.'s mouth. That activity also occurred in the bathroom of defendant's house. J.M. denied that defendant ever asked J.M. to touch defendant's penis with anything besides J.M.'s mouth. However, he stated defendant did reach around J.M. and touch J.M.'s penis with his hand while defendant's penis was "in [J.M.'s] butt."

¶ 7 J.M. further recalled that, sometimes, defendant put something that "looked like a little balloon" over his penis. Defendant also used "an extender" on his penis, which he placed "in [J.M.'s] butt hole." J.M. stated the "extender" was "a little tube type thing" that defendant put on his penis to make it longer. According to J.M. it "felt like petroleum jelly *** but really, really hard." He stated he learned the word "extender" from his mother, who "researched it" after he explained to her what had happened with defendant.

¶ 8 J.M. also testified that he sometimes went to the basement of defendant's house

because some of his toys were kept there. On one occasion when defendant was gone, J.M. went to an area of the basement where defendant had a desk and saw cut-out pictures of little girls with "cut[-]out penises in their mouths."

¶ 9 J.M. testified defendant told him not to tell anyone about the abuse or he would "beat [J.M.] up" or "hurt" J.M.'s family. Defendant also promised to take J.M. to Disneyland. J.M. testified he first reported the abuse to his uncle, who then told J.M.'s mother. He finally reported what was happening because he was "tired of it," and he did not tell earlier because he did not want "to get [his] family hurt." According to J.M., all of the activities he described happened in one house, which was the same house defendant was living in during the summer of 2017. J.M. did not recall how many times something happened, he only knew it "happened a lot." He testified he was 11 years old "when it stopped."

¶ 10 On cross-examination, J.M. recalled being interviewed twice by "a lady" at the Child Advocacy Center (CAC), once in December 2017, and once in October 2018. He agreed that during those interviews he reported that, before the first incident of abuse, defendant told him "not to tell anyone." J.M. also reported that defendant stated, "stay still mother effer." J.M. testified those reports were accurate and defendant made both statements. J.M. also acknowledged that he previously reported that he bit defendant's penis when defendant put it inside his mouth and, thereafter, defendant "never did it again." However, he denied telling the interviewer that such activity only occurred once.

¶ 11 Further, J.M. either denied or stated he did not remember previously reporting that (1) the "sticky" substance he noticed on his buttocks was called "semen"; (2) the abuse occurred in three different houses where defendant lived—a blue house, a white house, and an alabaster

house; (3) the abuse started in the blue house; (4) that others, including his father, grandmother, and cousin, were usually home when defendant abused him; and (5) his grandmother "butt f*** [him] with a dildo while [defendant] held [him] down." Instead, J.M. maintained that the abuse occurred only in the bathroom of the house where defendant was living in 2017. He asserted "nobody was really home" when the abuse occurred and testified that it was not true that his grandmother abused him with defendant.

¶ 12 Finally, J.M. asserted he told the CAC interviewer about the "balloon thing" he saw defendant use and that defendant had threatened to kill his family. He also reiterated that he first heard the word "extender" from his mother and testified defendant first mentioned taking him to "Disney" when J.M. stated he was going to tell his dad about what was going on. J.M. denied that he "ever heard anyone else in [his] family mention going to Disney." He testified that the last time the abuse occurred was during the summer of 2017 but denied that defendant engaged in sexual activity with him on July 4, 2017.

¶ 13 As part of its case, the State introduced and published to the trial court a recording of J.M.'s December 2017 CAC interview. In presenting his defense, defendant introduced and published a recording of J.M.'s second CAC interview, which occurred in October 2018. The record shows that during his initial interview in December 2017, J.M. reported that defendant "molested" him by making J.M. bend over and placing his penis in J.M.'s "butt." J.M. also asserted defendant penetrated him while using an "extender" on his penis and stated he had to wipe "oozy stuff," or "semen," that came from defendant off of his butt with toilet paper. According to J.M., defendant anally penetrated him too many times to count. Defendant also "tried to put [his penis] in [J.M.'s] mouth but [J.M.] bit it and [defendant] never really did it again." J.M. denied that there

was any other form of sexual contact between defendant and himself.

¶ 14 J.M. maintained the abuse only occurred in the bathroom of defendant's home. He stated defendant had lived in three different houses—a blue house, a white house, and an alabaster house—and that the abuse started in the blue house when he was about six years old. According to J.M., defendant promised to take him to Disneyland and told him not to tell anyone about what defendant was doing. When the abuse occurred, others were typically home, including J.M.'s father, grandmother, and cousin. J.M. reported that defendant last abused him on July 4, 2017, when J.M. went to take a shower after watching fireworks. Additionally, he reported that he observed defendant watching "kiddie porn" and saw "pictures" defendant had of children that were cut out from magazines with pictures of penises placed into slits in their mouths.

¶ 15 During his October 2018, CAC interview, J.M. reported that he had been having "flashbacks" and dreams that caused him to remember more about the sexual abuse he suffered. Specifically, he had a flashback that his grandmother, Cheryl, "butt f*** [him] with a [red] dildo." Following a dream, he remembered that Cheryl used the "dildo" to penetrate his anus while he was in the bathtub and that defendant was holding him down. J.M. maintained he was abused by Cheryl "a lot." He also reported that when he was abused at his grandparents' home, his dad and cousin were usually gone. Additionally, J.M. stated he recalled defendant telling him to "stay still mother effer."

¶ 16 Jacqueline testified for the State that she filed for divorce from Brian in 2010 and that their divorce was not finalized until 2018. She described the parties' divorce as amicable and testified it took so long to finalize because of money and the parties' residing in different locations. She testified she resided in Kentucky and Brian lived in Illinois and "[i]t was just [a] situation

[where] he couldn't get to Kentucky" and she "couldn't get to Illinois at the time." According to Jacqueline, J.M. said the word "extender" to her when he disclosed the abuse. She then "looked it up" because she did not know what an "extender" was.

¶ 17 Eric Matthews testified for the State that he was a detective for the Decatur Police Department and investigated J.M.'s allegations against defendant. On January 15, 2018, he went to defendant's home to speak with him. During his visit, he learned defendant was born on March 30, 1949. Defendant denied the allegations against him and gave Matthews consent to search his residence. Matthews asked defendant where in his residence he watched pornography, and defendant directed him to an area of his basement that defendant called his "man cave." The area was "cordoned off by bed sheets that were hung from the ceiling" and contained a makeshift desk, a television, a DVD player, a chair, and stacks of DVDs and magazines. Under a board in defendant's "man cave," Mathews observed "multiple cutout pictures of young female children's faces that had slits cut into the mouths and cutout images of male penises inserted into those slits." The room also contained a portable heater with "several masturbatory aids on [the] heater."

¶ 18 Matthews testified that when questioned about the "cutouts," defendant stated "he had been cutting out images of young girls' faces and inserting penises into their mouths for years and that it was a fantasy of his." Defendant acknowledged fantasizing about young girls since he was a teenager, stating he was drawn to their "youthfulness and innocence." He reported that he had "been trying to stop his fantasies for his whole life and ha[d]n't been able to." Defendant believed he needed counseling, stating he was sexually abused as a child by his uncle. He denied being gay and asserted that "homosexual pornography" found in his "man cave" belonged to his son. When questioned further about J.M.'s allegations, defendant stated J.M. had walked in on him

two or three times while he was watching pornography and masturbating.

¶ 19 The same day, Matthews interviewed defendant at the police station. The interview was recorded, and the recording was admitted into evidence and published at defendant's bench trial. During the interview, defendant initially denied any physical contact of a sexual nature with J.M. However, shortly following that denial, he stated J.M. had walked in on him while he was masturbating in the basement and "grabbed" his penis. Defendant asserted he told J.M. to get away and J.M. may have got defendant's semen on his hand. He also reported that on a second occasion, J.M. came to the basement and defendant did not stop J.M. from watching him masturbate. On a third occasion, defendant showed J.M. how to masturbate while they watched adult pornography. Defendant stated that while he was masturbating, J.M. pulled his own pants down and began touching himself.

¶ 20 Defendant denied that he engaged in anal sex with J.M., that he touched J.M.'s penis, or that he ejaculated on J.M.'s butt. However, he stated that during a fourth incident in the basement, J.M. had been curious and asked him about the "white stuff." On that occasion, J.M. watched defendant ejaculate. Finally, although defendant stated he knew what an "extender" was and described what one looked like, he had never owned or used one.

¶ 21 Matthews testified defendant was not arrested until January 24, 2018. Following that arrest, Matthews interviewed him a second time. A recording of the second interview was also admitted into evidence and published at trial. During the second interview, Matthews told defendant it was his opportunity to "be truthful" and "get everything on the table" before his case went before a judge or jury. In response, defendant stated that he showed J.M. how to masturbate and in doing so, put his hand on J.M.'s penis. He stated J.M. also put his hand on defendant's

penis. Defendant further reported that J.M. made inquiries about anal sex that resulted in J.M. pulling his own pants down, bending over, and defendant rubbing his penis on the "crack" of J.M.'s buttocks. Defendant stated his penis "probably" did touch and go in J.M.'s anus.

¶ 22 Defendant told Matthews that J.M. frequently walked in on him in the basement. He denied that anything ever occurred in the bathroom of his residence and maintained his penis only touched J.M.'s buttocks on one occasion. He also denied promising to take J.M. to Disneyland. When asked to explain why J.M. would report that he had to wipe defendant's semen off his buttocks, defendant theorized that it could have been Vaseline because "each time" J.M. walked in on him in the basement, he just got through watching pornography and masturbating.

¶ 23 On cross-examination, Matthews testified that during his search of defendant's home, he did not find what J.M. had described as an "extender." Further, he agreed that defendant's statements regarding the alleged abuse changed substantially over time. On redirect examination, Matthews agreed that there were times during his January 15, 2018, interview with defendant that he tried to take a break but he "kept getting called back in [the interview room] by [defendant] to continue the conversation."

¶ 24 Aside from the recording of J.M.'s second CAC interview in October 2018, defendant also presented testimony from Cheryl and Brian. Both denied ever seeing defendant and J.M. in the bathroom at the same time and testified such an occurrence would have been unusual. Cheryl also denied telling Matthews that she knew about defendant's "cutout pictures of young girls with penises inserted into their mouths" or that he had sexual fantasies about young girls. Brian denied ever hearing J.M. talk about going to Disneyland or Walt Disney World but stated that J.M. had probably heard him talk about such places. Brian testified he was kidnapped in 1996

when he was 15 years old by a man who took him to Walt Disney World and sexually abused him. Brian stated he began talking to J.M. about his kidnapping when J.M. was six or seven years old and spoke to him about it every day to make J.M. "aware of the dangers that were out there in the world."

¶ 25 Finally, the State called Matthews in rebuttal. Matthews testified when he visited defendant's residence in January 2018, Cheryl reported to him that she was aware of defendant's fantasies about young girls and stated that "he would never act on it." She also reported that she was aware of defendant's cutouts of young girls' faces with penises inserted into their mouths.

¶ 26 Ultimately, the trial court found defendant guilty of one count of predatory criminal sexual assault of a child based on defendant placing his penis in J.M.'s anus (count I) and two counts of aggravated criminal sexual abuse based on J.M. touching defendant's penis with his hand (count IV) and defendant's semen being on J.M.'s buttocks (count V). The trial court also found defendant guilty of possessing child pornography (count VII). In reaching its decision, the court stated as follows:

> There is no doubt in my mind that something bad happened to [J.M.]. There was a lot of inconsistencies in [J.M.'s] testimony. [Defense counsel] did a good job of laundry listing it today in terms of where [the abuse] occurred, the number of times it occurred, the people who were present when it occurred, what occurred, whether grandma was involved in the process, whether threats were made, and so on and so forth. And if the State's case was solely based on [J.M.'s] testimony, I think we would be in a much different position today than where [defendant] finds himself."

¶ 27 The trial court stated the inconsistencies in J.M.'s statements accounted for its

findings that defendant was not guilty of predatory criminal sexual assault of a child as alleged in counts II and III, based on defendant placing his penis in J.M.'s mouth and an object in J.M.'s anus. Regarding count VI, charging defendant with aggravated criminal sexual abuse based upon defendant placing his hand on J.M.'s penis, the court stated as follows: "As to Count VI, essentially, [J.M.] said it never happened. The defendant said it did happen. That is all the testimony. I can't make a finding of beyond a reasonable doubt based on those two statements."

¶ 28 The trial court found defendant's admissions were "very important, if not critical" to the charges of which it found defendant guilty. It determined his statements were reliable and not coerced. The court noted that although Matthews was "very persistent, *** it was the defendant who wanted to talk" and who "wanted to make statements even after *** Matthews attempted to leave the room on a number of different occasions." Additionally, the court determined "the physical evidence that was found in" defendant's basement corroborated his statements that he "violated" J.M.

¶ 29 Finally, as to child pornography, the trial court "sua sponte" found defendant guilty of "unlawful possession of child pornography, a Class 3 felony." It stated the cutouts in question constituted child pornography, describing them as "sick" and "perverse" and noting they depicted "a penis sticking out of a little girl's mouth that was specifically taped to her mouth by the defendant and they [involved] actual children apparently cut out of parenting magazines."

¶ 30 In June 2019, defendant filed a "motion to reconsider verdict or for new trial." He argued the State's evidence was insufficient to prove his guilt beyond a reasonable doubt. Defendant asked the court to reconsider its findings of guilt and enter judgments of not guilty or grant him a new trial. The State filed a response, asserting defendant's allegation that the evidence

was insufficient was "not specific." It "object[ed]" to defendant's request for relief and stated it was "rely[ing] on [its] previous arguments."

¶ 31 In July 2019, the trial court conducted defendant's sentencing hearing. It initially considered defendant's motion to reconsider. In addressing that motion, the parties elected to rely on their previous filings. The court denied the motion, stating as follows:

> "I did take some time and carefully review the evidence. I'm sure the two of you picked up on this, but the counts to which [defendant] was found guilty were all counts where the victim indicated something had occurred, and then by the defendant's own statement he confessed or corroborated the same behavior. And as to the other counts, there was just a lot of discrepancy regarding the testimony, and, obviously, that was the basis for my ruling."

The court then sentenced defendant to a total of 20 years in prison. Specifically, it sentenced him to 15 years in prison for predatory criminal sexual assault of a child (count I), 5 years in prison for each aggravated criminal sexual abuse conviction (counts IV and V), and 3 years in prison for possessing child pornography (count VII). The court ordered defendant's sentences for counts IV, V, and VII to be served concurrently with one another but consecutive to defendant's sentence for count I.

¶ 32 The same month, defendant filed a motion to reconsider his sentence. In September 2019, the trial court denied defendant's motion.

¶ 33 This appeal followed.

¶ 34 II. ANALYSIS

¶ 35 On appeal, defendant seeks the reversal of each of his convictions, arguing the

evidence presented was insufficient to establish his guilt. He argues that his convictions for each of the contact sex offenses violated the corpus delicti rule. Defendant also contends that to the extent his convictions for counts I and V were not barred by that rule, the evidence was otherwise insufficient to establish his guilt of those offenses. Additionally, he maintains his child pornography conviction must be reversed because it was based on his possession of material that cannot constitutionally be deemed child pornography.

¶ 36 A. Count IV—Aggravated Criminal Sexual Abuse

¶ 37 In count IV, the State charged defendant with aggravated criminal sexual abuse based upon contact between J.M.'s hand and defendant's penis. On appeal, defendant argues the corpus delicti rule bars his conviction for that offense because the only evidence of the sexual conduct alleged was his own uncorroborated statement to the police. We agree.

¶ 38 "The corpus delicti of an offense is simply the commission of a crime" and "[a]long with the identity of the person who committed the offense, it is one of two propositions the State must prove beyond a reasonable doubt to obtain a valid conviction." People v. Lara, 2012 IL 112370, ¶ 17, 983 N.E.2d 959. "In general, the corpus delicti cannot be proven by a defendant's admission, confession, or out-of-court statement alone." Id. "When a defendant's confession is part of the corpus delicti proof, the State must also provide independent corroborating evidence." Id.

> "[T]he corpus delicti rule requires only that the corroborating evidence correspond with the circumstances recited in the confession and tend to connect the defendant with the crime. The independent evidence need not precisely align with the details of the confession on each element of the charged offense, or indeed to any particular

element of the charged offense." Id. ¶ 51.

"If a confession is not corroborated [by independent evidence], a conviction based on the confession cannot be sustained." People v. Sargent, 239 Ill. 2d 166, 183, 940 N.E.2d 1045, 1055 (2010).

¶ 39 Here, we find the supreme court's decision in Sargent, cited by both parties, is factually similar to the present case and dispositive. In that case, the defendant was convicted of multiple counts of predatory criminal sexual assault and aggravated criminal sexual abuse for engaging in various sexual acts with his minor stepsons, J.W. and M.G. Id. at 169. The charges against him were based on allegations that he placed a part of his body in J.W.'s anus (supporting one count of predatory criminal sexual assault), placed a finger in M.G.'s anus (supporting three counts of predatory criminal sexual assault), and fondled M.G.'s penis (supporting two counts of aggravated criminal sexual abuse). Id. at 169-70. On appeal, the defendant challenged several of his convictions as they related to M.G. on the basis "that the only evidence adduced by the State on [the challenged] counts consisted of his own, uncorroborated confession." Id. at 182.

¶ 40 The supreme court agreed, finding defendant was properly convicted of predatory criminal sexual assault of J.W. and one count of predatory criminal sexual assault of M.G., but his remaining convictions could not "be sustained under the corroboration rule," i.e., the corpus delicti rule. Id. at 194. Regarding the defendant's convictions for aggravated criminal sexual abuse of M.G., the court noted that "[a]side from [the] defendant's confession, *** there was no evidence of any kind to corroborate that [the] defendant had, in fact, ever touched M.G.'s penis for any purpose." Id. at 184. Further, it rejected the State's argument that evidence of the defendant engaging in other charged sexual activity with the minors provided "sufficient corroboration that

[the] defendant also fondled M.G.'s penis." Id. The court stated as follows:

> "The State contends that evidence of [the] defendant's penetration of M.G.'s anus with his finger and of J.W.'s anus with his penis provides sufficient corroboration that [the] defendant also fondled M.G.'s penis. We note, however, that these were separate acts which gave rise to separate charges. Our precedent demonstrates that under the corroboration rule, the independent corroborating evidence must relate to the specific events on which the prosecution is predicated. Correspondingly, where a defendant confesses to multiple offenses, the corroboration rule requires that there be independent evidence tending to show that defendant committed each of the offenses for which he was convicted. [Citation.]
>
> Such proof is lacking here. *** [A]side from [the] defendant's confession, no evidence was adduced which tended to support the charges that [the] defendant fondled M.G.'s penis for purposes of his own sexual gratification. There may be circumstances where criminal activity of one type is so closely related to criminal activity of another type that corroboration of one may suffice to corroborate the other, but such circumstances are not present here. [Citation.] [The] [d]efendant's convictions and sentences on the two counts of aggravated criminal sexual abuse of M.G. must therefore be reversed." Id. at 184-85.

¶ 41 As indicated, the supreme court also found only one of the defendant's three convictions for predatory criminal sexual assault of M.G., each based on the defendant's penetration of M.G.'s anus with his finger, was sufficiently supported under the corroboration, or corpus delicti, rule. Id. at 185. It noted that although the defendant confessed to penetrating M.G.'s

anus with his finger 50 to 70 times, the nonconfession evidence only clearly corroborated one act of penetration. Id. at 185-87.

¶ 42 Here, like in Sargent, defendant was charged with multiple sex offenses based upon separate and distinct sexual acts. In count IV, the State specifically charged defendant with aggravated criminal sexual abuse of J.M., asserting that defendant "had J.M. place his hand on the defendant's penis for the purpose of sexual gratification." See 720 ILCS 5/11-1.60(c)(1)(i) (West 2016) (providing that "[a] person commits aggravated criminal sexual abuse if *** that person is 17 years of age or over and *** commits an act of sexual conduct with a victim who is under 13 years of age"). However, the only evidence that J.M. ever touched defendant's penis came from defendant's own recorded statements to the police. At trial, J.M. described sexual acts involving anal and oral penetration of J.M. by defendant, as well as defendant touching J.M.'s penis. However, J.M. never described using his hand to touch defendant's penis and expressly denied that he was ever asked to touch defendant's penis with anything other than his mouth. Similarly, J.M.'s recorded statements fail to contain any description of the specific sexual conduct alleged in count IV.

¶ 43 In responding to defendant's argument regarding count IV, the State cites Sargent for the proposition that some criminal activity may be "so closely related" to another type of criminal activity that "corroboration of one may suffice to corroborate the other." Sargent, 239 Ill. 2d at 185. It also argues that corroboration is not compulsory for each element of a charged offense and suggests J.M.'s statements regarding the other charged sexual acts—including anal and oral penetration and defendant's hand on J.M.'s penis—are sufficient corroboration of defendant's confession for the act alleged in count IV—J.M.'s hand on defendant's penis. However, as set

forth above, this is precisely the argument rejected by the supreme court in Sargent under very similar factual circumstances. Thus, although the State correctly recites the applicable law under the corpus delicti rule, it neglects to consider the manner in which Sargent actually applied that law. Like in Sargent, there was simply no independent evidence corroborating defendant's confession that related to the specific event upon which count IV was predicated. Accordingly, defendant's conviction for that offense runs afoul of the corpus delicti rule.

¶ 44 In so holding, we note that, as defendant argues, the record suggests some confusion by the trial court regarding count IV, of which it found defendant guilty, and count VI, of which it found defendant not guilty. Again, in count IV, the State charged defendant with aggravated criminal sexual abuse of J.M. based on J.M.'s hand touching defendant's penis. In count VI, it charged him with the same offense but based on defendant's hand touching J.M.'s penis. As discussed above, the act alleged in count IV was only supported by defendant's own statements. J.M. never testified or provided a statement indicating he touched defendant's penis with his hand. The act alleged in count VI, defendant's hand on J.M.'s penis, was supported by not only defendant's statements to the police, but also J.M.'s trial testimony.

¶ 45 However, following defendant's bench trial, the trial court made the following comments regarding count VI when setting forth the basis of its not guilty findings: "As to Count VI, essentially, [J.M.] said it never happened. The defendant said it did happen. That is all the testimony. I can't make a finding of beyond a reasonable doubt based on those two statements." The court's comments clearly conflict with the evidence presented at defendant's trial because J.M. did, in fact, testify that defendant touched his (J.M.'s) penis. It appears that what the court was actually describing was the state of the evidence as it related to count IV, which described a

similar act, i.e., hand-to-penis contact.

¶ 46 The trial court's apparent confusion notwithstanding, the record ultimately reflects the court found defendant guilty of count IV, which was only supported by defendant's uncorroborated statements to the police. Thus, under the corpus delicti rule, his conviction and sentence for that offense may not stand and must be reversed.

¶ 47 B. Counts I and V—Predatory Criminal Sexual Assault of a Child and Aggravated Criminal Sexual Abuse

¶ 48 On appeal, defendant next argues his convictions for counts I and V were also obtained in violation of the corpus delicti rule because J.M.'s testimony "failed to corroborate any of the specific facts of" defendant's own statements to the police. Alternatively, defendant argues the many inconsistencies in J.M.'s statements rendered the allegations against him "so incredible that no rational trier of fact could have found [his] guilt to be established beyond a reasonable doubt."

¶ 49 When faced with a challenge to the sufficiency of the evidence, "a reviewing court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis and internal quotation marks omitted.) People v. Harris, 2018 IL 121932, ¶ 26, 120 N.E.3d 900. "A conviction will not be reversed on appeal for insufficient evidence unless the evidence is so improbable or unsatisfactory that a reasonable doubt remains as to the defendant's guilt." Id.

¶ 50 As set forth above, the corpus delicti of an offense, i.e., the commission of a crime, "cannot be proven by a defendant's admission, confession, or out-of-court statement alone." Lara,

2012 IL 112370, ¶ 17. Rather, "[w]hen a defendant's confession is part of the corpus delicti proof, the State must also provide independent corroborating evidence." Id. "[C]orroboration is sufficient to satisfy the corpus delicti rule if the evidence, or reasonable inferences based on it, tends to support the commission of a crime that is at least closely related to the charged offense. Id. ¶ 45.

> "Under our system of criminal justice, the trier of fact alone is entrusted with the duties of examining the evidence and subsequently determining whether the State has met its burden of proving the elements of the charged offense beyond a reasonable doubt. Once the case is in the hands of the fact finder, its role is to evaluate the credibility of the witnesses, weigh the conflicting evidence, draw reasonable inferences, resolve evidentiary conflicts to determine the facts, and, finally, to apply the law as instructed to arrive at a verdict. [Citations.] Inherent in those responsibilities is the need to consider a variety of evidence, some conflicting or unclear, addressing the corpus delicti, the identity of the offender, or both.
>
> The primary purpose of the corpus delicti rule is to ensure the confession is not rendered unreliable due to either improper coercion of the defendant or the presence of some psychological factor. [Citations.] Unless a confession cannot be sufficiently corroborated to fulfill this purpose, it remains one stick in the evidentiary bundle the trier of fact may use in deciding whether the State has met its burden of proving beyond a reasonable doubt that the defendant committed the charged offenses." Id. ¶¶ 46-47.

¶ 51 Here, the State charged defendant in count I with predatory criminal sexual assault of a child, alleging "defendant placed his penis in the anus of J.M." See 720 ILCS 5/11-1.40(a)(1)

(West 2016) ("A person commits predatory criminal sexual assault of a child if that person is 17 years of age or older, and commits an act of contact, however slight, between the sex organ or anus of one person and the part of the body of another for the purpose of sexual gratification or arousal of the victim or the accused, or an act of sexual penetration, and *** the victim is under 13 years of age ***."). In count V, the State charged him with aggravated criminal sexual abuse, alleging he "transmitted or transferred his semen" onto J.M.'s buttocks. See id. § 11-1.60(c)(1)(i) ("A person commits aggravated criminal sexual abuse if *** that person is 17 years of age or over and *** commits an act of sexual conduct with a victim who is under 13 years of age ***."); see also id. § 11-0.1 (" 'Sexual conduct' means *** any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim ***.").

¶ 52 At defendant's bench trial, J.M. testified to the precise acts alleged in counts I and V. Specifically, he described instances when defendant's penis made contact with, and penetrated, his anus, as well as having to wipe defendant's semen off of his buttocks. The evidence showed he described the same acts during his initial CAC interview. Thus, the State's evidence as to counts I and V did not consist solely of defendant's recorded statements to the police. That there were inconsistencies in J.M.'s own statements and variances between J.M.'s version of events and defendant's version were simply matters for the trial court to resolve as the trier of fact in determining whether the alleged crimes were committed. However, under the circumstances presented, the inconsistencies and variances do not establish a corpus delicti rule violation.

¶ 53 Further, we find the evidence was not "so improbable or unsatisfactory that a reasonable doubt remains as to *** defendant's guilt." Harris, 2018 IL 121932, ¶ 26. As stated, both J.M.'s trial testimony and his statements during the initial CAC interview described the

specific acts alleged. Although his statements contained inconsistencies, those inconsistencies were acknowledged by the trial court, and they accounted for the not guilty verdicts for three of the charged offenses. Ultimately, the court's comments reflect that it found J.M.'s testimony credible, particularly where corroborated by defendant's admissions to the police.

¶ 54 In his statements to the police, defendant acknowledged having sexual fantasies about young children (albeit only female children) and engaging in sexual acts with and in the presence of J.M. He admitted masturbating and ejaculating in J.M.'s presence and specifically acknowledged an occasion when his penis came into contact with J.M.'s anus. The trial court found defendant's statements to the police were reliable and not coerced, and we find no error in that determination. Defendant was interviewed by Matthews on two occasions. The tone of both interviews was conversational, and as noted by the court, there were several instances when Matthews attempted to leave the interview room but remained because defendant kept talking. We find defendant's admissions supported J.M.'s statements regarding the specific sexual acts alleged in counts I and V. Accordingly, the evidence presented was sufficient to sustain his convictions for both offenses.

¶ 55 C. Count VII—Child Pornography

¶ 56 Finally, as stated, defendant argues his child pornography conviction should be reversed because it is based on his possession of material that cannot constitutionally be deemed child pornography. Defendant admits to creating and possessing "collages" that combined, in a sexually explicit manner, images of actual children cut from parenting magazines with images of adult male genitalia that he cut from adult magazines. However, he argues that because his "collages" were not "a record of an actual sex act performed by a child" and no children were

harmed by their creation, they do not constitute child pornography and characterizing them as such would violate the first amendment. Defendant maintains that any construction of the Illinois child pornography statute that "could criminalize collages made from lawful images" would render the statute unconstitutional and, thus, the statute should not be interpreted in that manner. We disagree.

¶ 57 In New York v. Ferber, 458 U.S. 747, 763 (1982), "[t]he United States Supreme Court recognized child pornography as a category of material outside the protection of the First Amendment." (Internal quotation marks omitted.) People v. Lamborn, 185 Ill. 2d 585, 588, 708 N.E.2d 350, 353 (1999). "The reason underlying [Ferber's] holding is that the crime of child pornography is an offense against the child and causes harm 'to the physiological, emotional, and mental health' of the child." Id. (quoting Ferber, 458 U.S. at 758). Under Ferber, a state may prohibit the dissemination of material depicting children "engaged in sexual conduct, regardless of whether the depiction is legally 'obscene.' " Id. at 589 (citing Ferber, 458 U.S. at 756). Supreme Court authority further provides that states may constitutionally proscribe the possession and viewing of child pornography. Osborne v. Ohio, 495 U.S. 103, 111 (1990).

¶ 58 "The purpose of [Illinois's] child pornography statute is to prevent the sexual abuse and exploitation of children." People v. Hollins, 2012 IL 112754, ¶ 18, 971 N.E.2d 504. In this case, the State originally charged defendant with child pornography, a Class X felony, under section 11-20.1(a)(1)(ii) of the Criminal Code of 2012 (Code) (720 ILCS 5/11-20.1(a)(1)(ii) (West 2016)). That section provides as follows:

> "A person commits child pornography who:
>
> (1) films, videotapes, photographs, or otherwise depicts or portrays by means of any similar visual medium or reproduction or depicts by computer

> any child whom he or she knows or reasonably should know to be under the age of 18 *** where such child *** is:
>
> ***
>
> (ii) actually or by simulation engaged in any act of sexual penetration or sexual conduct involving the sex organs of the child *** and the mouth, anus, or sex organs of another person or animal; or which involves the mouth, anus or sex organs of the child *** and the sex organs of another person or animal[.]" Id.

Ultimately, the trial court sua sponte found defendant guilty of the lesser included offense of possessing child pornography, a Class 3 felony offense, under section 11-20.1(a)(6) of the Code (Id. § 11-20.1(a)(6)). That section provides as follows:

> "A person commits child pornography who:
>
> * * *
>
> (6) with knowledge of the nature or content thereof, possesses any film, videotape, photograph or other similar visual reproduction or depiction by computer of any child *** whom the person knows or reasonably should know to be under the age of 18 ***, engaged in any activity described in subparagraphs (i) through (vii) of paragraph (1) of this subsection[.]" Id.

See also Id. § 11-20.1(c) ("If the violation does not involve a film, videotape, or other moving depiction, a violation of paragraph (6) of subsection (a) is a Class 3 felony ***.").

¶ 59 At issue is whether defendant's "collages" in this case constitute child pornography under section 11-20.1 of the Code. Statutory interpretation presents a question of law that we

review de novo. See Lamborn, 185 Ill. 2d at 590. "In construing a statute, a court is to ascertain and give effect to the legislature's intent in its enactment." People v. Geever, 122 Ill. 2d 313, 324, 522 N.E.2d 1200, 1205 (1988). "The most reliable indicator of legislative intent is the language of the statute, given its plain and ordinary meaning." People v. Clark, 2019 IL 122891, ¶ 20, 135 N.E.3d 21. Also, "[i]t will be presumed that the legislature acted in light of the provisions of the Constitution and did not propose to act inconsistently with its protections." Geever, 122 Ill. 2d at 324. "Accordingly, a court must construe a statute as not offending the Constitution, provided that the construction is a reasonable one." Id.

¶ 60 To support his contention that his "collages" may not constitutionally be deemed child pornography because "they were not the products of child abuse," defendant primarily relies on the United States Supreme Court's decision in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002). In that case, the Court considered the constitutionality of portions of the federal Child Pornography Prevention Act of 1996 (CPPA) (18 U.S.C. § 2251 et seq. (2012)), which extended "the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children." Ashcroft, 535 U.S. at 239-41. It found those provisions, which included a ban on virtual pornography produced without the use of actual children, infringed upon first amendment rights. Id. at 256. In setting forth its decision, the Court determined that the challenged portions of the CPPA impermissibly prohibited "speech that records no crime and creates no victims by its production" and stated that "[v]irtual child pornography is not 'intrinsically related' to the sexual abuse of children." Id. at 250.

¶ 61 Significantly, however, the Supreme Court also noted that a separate portion of the CPPA, which "prohibit[ed] a more common and lower tech means of creating virtual images,

known as computer morphing," had not been challenged and was not addressed by its decision. Id. at 242. It described the "morphing" of images as follows:

> "Rather than creating original images, pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity. Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in Ferber[, 458 U.S. 747]." (Emphasis added.) Id.

Notably, the Court described Ferber as involving "images made using actual minors." Id. at 241.

¶ 62 Following Ashcroft, our supreme court found a portion of the Illinois child pornography statute also violated first amendment protections because, like the federal CPPA, it included a ban on virtual child pornography rather than pornography made with identifiable children. People v. Alexander, 204 Ill. 2d 472, 482-83, 791 N.E.2d 506, 513 (2003). The court struck the offending portion, finding it severable from the remainder of the statute. Id. at 484. It held that the statute's remaining provisions, which prohibited "making and possessing sexually explicit computer depictions of any actual child under 18 years of age" were constitutional. (Emphasis added.) Id. at 486. The court further stated as follows:

> "Ashcroft addressed only the question of whether a criminal prohibition of virtual child pornography—child pornography produced without using actual children—violated the first amendment. It did not invalidate all child pornography laws. We need not revisit the issue of whether criminalizing child pornography of actual, not virtual, children violates the first amendment. That issue was answered conclusively and convincingly in Ferber, and the Illinois child pornography statute

comports with that case." Id. at 487.

¶ 63 Here, although defendant seeks to apply Ashcroft to his particular circumstances, he does not deny that the "collages" he created involved "real" children rather than entirely virtual images. Thus, they are more similar to the "morphed" images described but not addressed by Ashcroft and which the Supreme Court contemplated involved a category of speech similar to Ferber and outside of first amendment protections. Accordingly, we find Ashcroft does not support defendant's position on appeal.

¶ 64 Additionally, we disagree with the proposition underlying defendant's argument in this case that the alteration of otherwise "innocent" or "legitimate" images of an actual minor into one that is sexually explicit results in no harm to the minor because it does not record the minor actually engaging in any sexual activity. In United States v. Hotaling, 599 F. Supp. 2d 306, 308 (N.D.N.Y. 2008), the defendant altered nonpornographic images of actual, identifiable children using a computer software program and combined them with pornographic images he obtained on the Internet. Specifically, he placed the heads of minor females "over the heads of unidentified nude or partially nude females in various sex acts and/or lascivious poses." Id. at 307. After being indicted for possessing child pornography based on his possession of the altered images, the defendant argued it was unconstitutional to criminalize the "mere possession of 'morphed' images, that is, images which have been altered to appear to depict identifiable minors engaged in sexually explicit conduct." Id. at 311. He maintained "that no actual child engaged in the conduct or activities depicted in the altered images and they were produced 'without exploiting minors.' " Id.

¶ 65 The district court ultimately denied the defendant's request to dismiss his indictment. Id. at 322. It held "that the creation and possession of pornographic images of living,

breathing and identifiable children via computer morphing is not 'protected expressive activity' under the Constitution" and such images implicated the interests of real children. Id. at 321 (quoting United States v. Williams, 553 U.S. 285, 297 (2008)). The court also "strongly disagree[d]" with the defendant's contention "that no demonstrable harm[ ] [citation] results to a child whose face, but not his or her naked body, is depicted in a pornographic image." (Internal quotation marks omitted.) Id. at 318. The court's analysis reflects a finding that harm to a minor comes from the creation of a lasting record of the minor " 'seemingly,' " though not actually, engaged in sexually explicit activity. Id. at 319 (quoting United States v. Bach, 400 F.3d 622, 632 (8th Cir. 2005) (stating that although a minor was not involved in the production of a pornographic image, "a lasting record" had been created of "an identifiable minor child, seemingly engaged in sexually explicit activity," which "victimized" the minor every time the picture was displayed)); see also United States v. Mecham, 950 F.3d 257, 267 (5th Cir. 2020) (noting child pornography "decisions have consistently cited the interest in preventing reputational and emotional harm to children as a justification for the categorical exclusion of child pornography from the First Amendment" and finding courts have also "recognized that morphed child pornography raises this threat to a child's psychological well-being").

¶ 66 Further, although the defendant's "collages" in the instant case are more rudimentary than the "morphing" that can be done through the use of computers, they, nevertheless, involve the alteration of "innocent pictures of real children so that the children appear to be engaged in sexual activity." Ashcroft, 535 U.S. at 242. We see no basis for finding defendant's "collages" do not pose the same type of reputational or emotional harm as more technologically sophisticated "morphed" images. See Hotaling, 599 F. Supp. 2d at 320 (favorably

citing an unreported district court decision that "rejected the defendant's arguments that his photo 'collages' made by juxtaposing adult nude bodies with cut-outs of children's faces taken from children's catalogs were protected by the First Amendment").

¶ 67 Here, the materials defendant possessed indisputably involved images of real, identifiable children that were combined with images of penises to depict acts of oral penetration. Such materials fall within the coverage of section 11-20.1 of the Code, and Ashcroft does not require a different conclusion.

¶ 68 We note defendant additionally argues that the "collages" he possessed did not constitute "films, videotapes, photographs" or "any similar visual medium or reproduction" as required by section 11-20.1 of the Code. 720 ILCS 5/11-20.1(a)(1) (West 2016). Ultimately, defendant puts forth no real analysis of this claim, and in any event, we disagree.

¶ 69 Section 11-20.1 does not define the term "similar visual medium." However, in plain and ordinary terms, items are "similar" if they "hav[e] characteristics in common" or are "alike in substance or essentials." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/similar (last visited Aug. 16, 2021) [https://perma.cc/K68P-33RZ]. Further, the word "visual" means "of, relating to, or used in vision"; "attained or maintained by sight"; or "visible." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/visual (last visited Aug. 16, 2021) [https://perma.cc/SV3W-388A]. Finally, "medium" is defined as "a means of effecting or conveying something." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/medium (last visited Aug. 16, 2021) [https://perma.cc/D3BU-6ZSK]. The "collages" at issue here were visible and conveyed a combination of still images taken from magazines. They are akin to photographs and constitute a

"similar visual medium" as set forth in section 11-20.1. Accordingly, we find defendant is not entitled to the reversal of his child pornography conviction as argued on appeal.

¶ 70 III. CONCLUSION

¶ 71 For the reasons stated, we reverse the defendant's conviction and sentence as to count IV charging him with aggravated criminal sexual abuse based upon J.M.'s hand touching defendant's penis but otherwise affirm the trial court's judgment.

¶ 72 Affirmed in part and reversed in part.

No. 4-19-0660

Cite as:	People v. McKown, 2021 IL App (4th) 190660
Decision Under Review:	Appeal from the Circuit Court of Macon County, No. 18-CF-136; the Hon. Thomas E. Griffith Jr., Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Catherine K. Hart, and Bryan JW McIntyre, of State Appellate Defender's Office, of Springfield, for appellant.
Attorneys for Appellee:	Scott Rueter, State's Attorney, of Decatur (Patrick Delfino, David J. Robinson, and Timothy J. Londrigan, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

No. 127683

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- JOHN T. McKOWN, Petitioner-Appellant.	)	Appeal from the Appellate Court of Illinois, No. 4-19-0660. There on appeal from the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, No. 18-CF-136. Honorable Thomas E. Griffith, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@ilag.gov;

Mr. David J. Robinson, Deputy Director, State's Attorney Appellate Prosecutor, 725 South Second Street, Springfield, IL 62704, 4thdistrict@ilsaap.org;

Scott Rueter, Macon County State's Attorney, 253 E. Wood Street, Suite 436, Decatur, IL 62523-1489, general@sa-macon-il.us;

Mr. John T. McKown, Register No. Y37782, Big Muddy River Correctional Center, 251 N. Illinois Highway 37, Ina, IL 62846

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On January 31, 2022, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the in an envelope deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Rachel A. Davis
LEGAL SECRETARY
Office of the State Appellate Defender
400 West Monroe Street, Suite 303
Springfield, IL 62704
(217) 782-3654
Service via email will be accepted at
4thdistrict.eserve@osad.state.il.us