APPENDIX

AO 245B (Rev. 02/18) Judgment in a Criminal Case
v1 Sheet 1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA
v.
Briand Daniel Fechner

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:17-CR-00112-001

USM Number: 55908-177

Timothy S. Ross-Boon
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) after a plea of not guilty. One and Two of the Second Superseding Indictment filed on June 27, 2018.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 2252A(a)(1), 2252A(b)(1)	Transportation of Child Pornography	03/31/2015	One
18 U.S.C. § 2252A(a)(2), 2252A(b)(1)	Receipt of Child Pornography	04/30/2015	Two

☐ See additional count(s) on page 2

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☑ Count(s) Three ☑ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

December 4, 2018
Date of Imposition of Judgment

Signature of Judge

John A. Jarvey, Chief U.S. District Judge
Name of Judge Title of Judge

December 4, 2018
Date

APPENDIX A

DEFENDANT: Briand Daniel Fechner
CASE NUMBER: 4:17-CR-00112-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

240 months, consisting of 240 months as to each of Counts One and Two of the Second Superseding Indictment filed on June 27, 2018, to be served concurrently.

☑ The court makes the following recommendations to the Bureau of Prisons:

That the defendant be placed as close to North Dakota as possible, or placed at FCI Sandstone, as commensurate with his security and classification needs. The court also recommends that the defendant be made eligible for sex offender treatment programming.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Briand Daniel Fechner
CASE NUMBER: 4:17-CR-00112-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :
15 years as to each of Counts One and Two of the Second Superseding Indictment filed on June 27, 2018, to be served concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☑ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☑ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☑ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

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STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

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SPECIAL CONDITIONS OF SUPERVISION

You must participate in a program of testing and/or treatment for substance abuse, as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Office. At the direction of the probation office, you must receive a substance abuse evaluation and participate in inpatient and/or outpatient treatment, as recommended. Participation may also include compliance with a medication regimen. You will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment. You must not use alcohol and/or other intoxicants during the course of supervision.

You must submit to a mental health evaluation. If treatment is recommended, you must participate in an approved treatment program and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment and/or compliance with a medication regimen. You will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

You must participate in an approved treatment program for domestic violence. Participation may include inpatient/outpatient treatment. You will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

You must participate in a sex offender treatment program, to include psychological testing and polygraph examinations, as directed by the U.S. Probation Officer. You must also abide by all supplemental conditions of sex offender treatment, to include abstaining from alcohol. Participation may include inpatient/outpatient treatment, if deemed necessary by the treatment provider. You must contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment. Sex offender assessments and treatment shall be conducted by therapists and polygraph examiners approved by the U.S. Probation Office, who shall release all reports to the U.S. Probation Office. The results of polygraph examinations will not be used for the purpose of revocation of supervised release or probation. If disclosure is required by mandatory reporting laws, polygraph results will be reported to appropriate treatment personnel, law enforcement, and related agencies with the approval of the Court. If polygraph results reveal possible new criminal behavior, this will be reported to the appropriate law enforcement and related agencies after obtaining approval from the Court.

You must not have any direct contact (personal, electronic, mail, or otherwise) with any child you know or reasonably should know to be under the age of 18, including in employment, without the prior approval of the U.S. Probation Officer. If contact is approved, you must comply with any conditions or limitations on this contact, as set forth by the U.S. Probation Officer. Any unapproved direct contact must be reported to the U.S. Probation Officer within 24 hours. Direct contact does not include incidental contact during ordinary daily activities in public places.

You must not view or possess any "visual depiction" (as defined in 18 U.S.C. § 2256), including any photograph, artwork, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of "sexually explicit conduct" (as defined in 18 U.S.C. § 2256). You must not correspond with anyone in the business of providing such material, or enter adult entertainment venues where sexually explicit conduct is the primary product(s) for purchase or viewing.

You must not access the internet or possess and/or use computers (as defined in 18 U.S.C. § 1030(e)(1)), internet capable devices, cellular telephones, and other electronic communications or data storage devices or media without the prior approval of the U.S. Probation Officer. If computer or internet use for employment is approved by the U.S. Probation Officer, you must permit third party disclosure to any employer or potential employer concerning any computer/internet related restrictions that are imposed upon you.

ADDITIONAL SPECIAL CONDITIONS OF SUPERVISION

If approved by the U.S. Probation Officer to use or possess computers (as defined in 18 U.S.C. § 1030(e)(1)), internet capable devices, cellular telephones, and other electronic communications or data storage devices or media, you must submit your devices to unannounced examinations/searches, and possible removal for a more thorough inspection. You must allow the installation of monitoring hardware and software on such equipment, abide by and cooperate in supplemental conditions of monitoring, and pay the costs associated with this service, as directed by the U.S. Probation Officer. You must notify third parties who use these devices that the devices are subject to monitoring and/or unannounced examinations.

You must comply with all sex offender laws for the state in which you reside and must register with the local sheriff's office within the applicable time frame.

If not completed within the Bureau of Prisons, you must reside, participate, and follow the rules of the residential reentry program, as directed by the U.S. Probation Officer, for up to 120 days. The residential reentry program is authorized to allow up to six hours of pass time per week for good conduct when you become eligible in accordance with the residential reentry program standards.

You will submit to a search of your person, property, residence, adjacent structures, office, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), and other electronic communications or data storage devices or media, conducted by a U.S. Probation Officer. Failure to submit to a search may be grounds for revocation. You must warn any other residents or occupants that the premises and/or vehicle may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of your release and/or that the area(s) or item(s) to be searched contain evidence of this violation or contain contraband. Any search must be conducted at a reasonable time and in a reasonable manner. This condition may be invoked with or without the assistance of law enforcement, including the U.S. Marshals Service.

You must not apply for, solicit, or incur any further debt, included but not limited to loans, lines of credit, or credit card charges, either as a principal or cosigner, as an individual, or through any corporate entity, without first obtaining written permission from the U.S. Probation Officer.

You must provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

You must pay restitution in the amount of $1,000 to the victim in the Tara Series, and $1,000 to victim "Pia" in the Sweet Sugar Series. You will cooperate with the U.S. Probation Officer in developing a monthly payment plan consistent with a schedule of allowable expenses provided by the U.S. Probation Office. You may be required to participate in an IRS Offset Program and/or Treasury Offset Program which may include the garnishment of wages or seizure of all or part of any income tax refund and/or any government payment to be applied toward the restitution balance.

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CASE NUMBER: 4:17-CR-00112-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

☐ Pursuant to 18 U.S.C. § 3573, upon the motion of the government, the Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

	Assessment	JVTA Assessment *	Fine	Restitution
TOTALS	$ 200.00	$ 0.00	$ 0.00	$2,000.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☑ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
*See Sealed Victim List		$2,000.00	
TOTALS		$0.00	$2,000.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☑ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☑ the interest requirement is waived for the ☐ fine ☑ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 2,200.00 due immediately, balance due

☐ not later than _____, or
☑ in accordance ☐ C, ☐ D, ☐ E, or ☑ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary payments are to be made to the Clerk's Office, U.S. District Court, P.O. Box 9344, Des Moines, IA. 50306-9344.
While on supervised release, you shall cooperate with the Probation Officer in developing a monthly payment plan consistent with a schedule of allowable expenses provided by the Probation Office.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All crimnal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:

an LG US990 cellular phone (SN: 410KPXV0022538); and a Micro SD Card, Model: PNY 16GB (SN: UD16GU1R90XMC2LB), as outlined in the Preliminary Order of Forfeiture, entered on September 17, 2018.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal,(5) fine interest, (6) community restitution, (7) JVTA assessment, and (8) costs, including cost of prosecution and court costs.

United States Court of Appeals
For the Eighth Circuit

No. 18-3711

United States of America

Plaintiff - Appellee

v.

Briand Daniel Fechner

Defendant - Appellant

Appeal from United States District Court
for the Southern District of Iowa - Des Moines

Submitted: December 13, 2019
Filed: March 12, 2020

Before ERICKSON, MELLOY, and KOBES, Circuit Judges.

ERICKSON, Circuit Judge.

Briand Daniel Fechner appeals his conviction for transportation of child pornography and receipt of child pornography in violation of 18 U.S.C. §§ 2252A(a)(1), (a)(2), and (b)(1). Fechner challenges the district court's[1] admission

[1]The Honorable John A. Jarvey, Chief Judge, United States District Court for the Southern District of Iowa.

of independently downloaded child pornography videos, charts summarizing materials obtained during the investigation, and child erotica images. We affirm.

I. Background

From September 2014 to March 2015, Agent Chris Thomas of the Iowa Division of Criminal Investigation downloaded child pornography files from a BitTorrent account on two Internet Protocol (IP) addresses associated with Fechner's home. During thirty-six download sessions from Fechner's IP addresses, law enforcement obtained at least 18 videos and 207 pictures of child pornography. In late March 2015, Fechner reset his phone and destroyed all user data. Additional child pornography was downloaded from Fechner's IP addresses in April 2015, including copies of files that law enforcement had previously downloaded from Fechner's IP addresses.

A forensic examination of Fechner's devices showed extensive child pornography downloads and searches, with over 100 items being moved to an SD card in his phone and later deleted. Fechner's IP address download history showed child pornography downloads very early in the morning or late at night. Fechner's phone and SD card contained meta-data evidence that child pornography videos were downloaded, viewed, and deleted from the phone. Although Fechner had deleted the materials, law enforcement was able to recover small sections of video and thumbnail images from the phone. These images and video clips matched the hash values of known child pornography.

At trial, the government used summary demonstrative exhibits to introduce three videos obtained from independent BitTorrent downloads by law enforcement from sites other than Fechner's devices. The actual videos from Fechner's phone and SD card were unplayable because they had been deleted. However, BitTorrent settings saved a thumbnail image to the device when a downloaded video was

opened. These artifacts could be identified by hash value and other information tied to the thumbnails. The demonstrative exhibits showed that the independently downloaded videos matched the names, thumbnail images, and hash values of the unplayable files on Fechner's phone and SD card. The government offered these independent downloads as evidence of child pornography on Fechner's devices. Fechner filed a motion in limine arguing that the videos were inadmissible under Federal Rules of Evidence 401, 403, and 404(b).

Fechner testified that he was a BitTorrent expert and a cell phone "superuser" with full access and control over all user data and applications on his phone. While he admitted to downloading movies, music, and sometimes adult pornography, Fechner claimed that he had not downloaded or shared child pornography on BitTorrent. The government's expert witness explained that the default settings on Fechner's BitTorrent app were changed to increase its sharing capabilities and that materials downloaded from BitTorrent would have had to manually be moved to the phone's SD card.

During Agent Thomas's testimony, the government offered and played six videos containing child pornography. After these videos were played, the government moved to admit exhibit 6, Agent Thomas's summary of the videos files downloaded during his undercover download sessions, under Federal Rule of Evidence 1006. Exhibit 6 included the file name, undercover download date, and a "very, very brief summary" of the videos already played for the jury as well as 16 additional videos that were playable but had not been admitted into evidence. The district court overruled Fechner's hearsay objection and admitted exhibit 6 as a Rule 1006 summary of voluminous records.

The government also introduced images of young girls and women found on Fechner's SD card that the district court described as child erotica. The government asserted that these images were relevant to show Fechner's sexual interest in children

and, based on their presence on the SD card, his knowledge of child pornography also located on the SD card. Fechner moved in limine to exclude these images under Federal Rules of Evidence 401 and 403 as both irrelevant and being more prejudicial than probative. The district court recognized that the possession of the child erotica was not illegal but determined that the evidence was probative to issues of knowledge, motive, and sexual interest in children and was not unduly prejudicial.

The jury convicted Fechner on all counts.

II. Discussion

We reverse a district court's evidentiary rulings only if they are a clear abuse of discretion that prejudices the defendant. United States v. Keys, 918 F.3d 982, 985 (8th Cir. 2019). We will not overturn a conviction due to cumulative trial errors absent substantial prejudice to the defendant. Id.

A. Independently Downloaded Videos

Fechner argues that the district court erred when it admitted the independently downloaded child pornography videos. The independently downloaded videos from BitTorrent matched the hash values, name, length, and thumbnail images to unplayable files on Fechner's phone and SD card which demonstrated that they were identical to the deleted files. Fechner alleges that the videos are more prejudicial than probative because they cannot establish that he knew his devices contained child pornography. The government argues that the videos are material to establishing that the unplayable files on the phone contained child pornography and that the matching meta-data makes Fechner's knowledge of child pornography on his phone and SD card more probable than without the evidence.

While child pornography videos are inherently disturbing, Rule 403 prohibits evidence that is unfairly prejudicial, not any evidence detrimental to a defendant's case. United States v. Johnson, 463 F.3d 803, 809 (8th Cir. 2006). Unfairly prejudicial evidence is so inflammatory on its face as to divert the jury's attention from the material issues in the trial. United States v. Betcher, 534 F.3d 820, 825 (8th Cir. 2008). Evidence does not need to be excluded merely because it is disturbing. United States v. McCourt, 468 F.3d 1088, 1092–93 (8th Cir. 2006). We afford the district court broad discretion to admit probative evidence even when prejudicial. United States v. Novak, 866 F.3d 921, 926 (8th Cir. 2017). And we have consistently found no abuse of discretion where a court admits relevant pornographic images. See United States v. Pruneda, 518 F.3d 597, 605 (8th Cir. 2008); see also United States v. Kelley, 861 F.3d 790, 798–99 (8th Cir. 2017).

In McCourt, we concluded that showing a limited number of child pornography videos, of a minimal duration, to the jury was relevant and did not constitute unfair prejudice. 468 F.3d at 1092. Here, like in McCourt, the jury saw only short clips of a few independently downloaded videos. These videos were relevant to establish that Fechner knowingly possessed child pornography. See Novak, 866 F.3d at 925 (finding evidence connecting defendant to external hard drive folders containing child pornography relevant to determine if defendant was guilty of knowing possession of child pornography). Because this evidence goes directly to the issues of the case, it is more probative than prejudicial. The district court did not err in admitting the independently downloaded videos.

B. Summaries

Fechner argues that the district court erred when it admitted exhibit 6, a summary of the videos downloaded by Agent Thomas during his undercover investigation, because the summary included brief descriptions of videos that had not been shown to the jury. The government offered exhibit 6 as a summary of

voluminous records under Rule 1006. Agent Thomas testified that he watched all of the videos and created the summary in part to prevent the jury from having to view all of the pornographic materials. Fechner's only objection to the Rule 1006 summary at trial was hearsay, and he argues that the summary included evidence not in the record for the first time on appeal.

We will not reverse a district court's decision on the admissibility of summary evidence absent an abuse of discretion. United States v. Green, 428 F.3d 1131, 1134 (8th Cir. 2005). Rule 1006 permits the use of "a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court." Fed. R. Evid. 1006. Summaries are properly admissible when (1) they fairly summarize voluminous trial evidence; (2) they assist the jury in understanding the testimony already introduced; and (3) the witness who prepared it is subject to cross-examination with all documents used to prepare the summary. United States v. Hawkins, 796 F.3d 843, 865 (8th Cir. 2015).

Rule 1006 allows for the admission of summaries "when doing so is the only practicable means of making [the content of voluminous evidence] available to the judge and jury." Id. Evidence used to create the summary must be made available for examination by other parties, and the court may require the evidence be produced in court. Fed. R. Evid. 1006; see United States v. Kilpatrick, 798 F.3d 365, 383 (6th Cir. 2015) ("The *point* of Rule 1006 is to avoid introducing all the documents." (emphasis in original)). The party offering a Rule 1006 summary has the burden of showing that the contents of the summary are admissible. 31 Wright & Miller, Fed. Prac. & Proc. Evid. § 8043 (1st ed.). Any assumptions or conclusions contained in a Rule 1006 summary must be based on evidence already in the record. Green, 428 F.3d at 1134. Summaries properly admitted under Rule 1006 can be treated as evidence and allowed in the jury room during deliberations, but the district court should issue proper limiting instructions. Id.

Here, exhibit 6 summarized videos which would have been admissible on their own. The summary included the names, the date created, and a brief description of 36 video files downloaded during undercover download sessions. Of these files, 15 stated only that "No video could be played" and 6 were already admitted into evidence. The descriptions in the summary depict what occurred in the video but do not make any conclusions or assumptions about the content. For example, one description states "Depicts a minor female in a swimming suit." Such statements are reports on what was contained in the video, not assumptions or conclusions that would require the evidence being summarized to already be in evidence. See United States v. Adejumo, 772 F.3d 513, 525 (8th Cir. 2014) (finding chart submitted before evidence made assumption that the defendant was the head of the conspiracy). Because exhibit 6 does not make assumptions or conclusions, the evidence summarized within it needed only to be admissible, not already admitted. The district court did not abuse its discretion in allowing the summary.

Even if exhibit 6 had made conclusions or assumptions, "[a]n erroneous evidentiary ruling is harmless if it did not have a substantial influence on the jury's verdict." Hawkins, 796 F.3d at 866 (cleaned up). Based on the record, we cannot say that the inclusion of brief descriptions of downloaded videos substantially influenced the jury's verdict. Prior to exhibit 6's admission, the jury viewed 6 of the child pornography videos included in the summary. Viewing these videos, in addition to the testimony and additional exhibits presented to prove Fechner's guilt, was sufficient to establish that the videos from the undercover downloads contained child pornography. Any additional information gleamed from exhibit 6 was cumulative and did not affect Fechner's substantial rights. Any error from admitting the summary was harmless. See Adejumo, 772 F.3d at 525 (finding improperly admitted summary harmless); see also Hawkins, 796 F.3d at 867 ("Given the strength of [the] evidence and the safeguards that were implemented to minimize the prejudicial effect of [the exhibit's] admission, we cannot say that the district court's evidentiary error had a substantial influence on the jury's verdict." (Internal quotation marks omitted)).

Fechner also argues that the three summary demonstrative exhibits, or pedagogic devices, are improperly conclusory. The district court has discretion to allow the use of demonstrative exhibits, and we review only if its use "was so unfair and misleading as to require a reversal." United States v. Needham, 852 F.3d 830, 837 (8th Cir. 2017) (internal quotation marks omitted). Fechner asserts that the inclusion of descriptions stating that the videos involve minors engaged in sexual activity and match thumbnails found on his devices make the demonstrative exhibits argumentative and improper. However, the demonstrative exhibits at issue merely provided a visual aid during Agent Thomas's testimony regarding other evidence. The videos described in the demonstrative exhibits were properly submitted into evidence, and the district court did not abuse its discretion by receiving the summary demonstrative exhibits.

C. Child Erotica Images

Fechner also contends the district court erred in admitting child erotica found on his SD card. He asserts that the images were improper propensity evidence used only to establish that he acted in accordance with his alleged character. The government argues that the images are intrinsic evidence used to provide a total picture of the charged crime. Alternatively, the government argues that the images are proper Rule 404(b) evidence to show motive, knowledge, and lack of accident. The government further asserts that because Fechner had to manually move the images to his SD card, the images evidence his knowledge and ability to place materials on and delete them from the SD card.

We reject the government's argument that the child erotica images are intrinsic evidence inextricably intertwined with the crime charged. See United States v. Heidebur, 122 F.3d 577, 580 (8th Cir. 1997). The existence of the images on the SD card is not "bad acts that form the factual setting of the crime in issue" or that "form an integral part of the crime charged." Id. at 579.

Although not intrinsic evidence, the child erotica images may still be admissible 404(b) evidence. We will reverse the district court's 404(b) ruling only if the evidence clearly has no bearing on the case. United States v. Campbell, 764 F.3d 880, 889 (8th Cir. 2014). "Propensity evidence, whether of a person's general character or examples of specific bad acts, is ordinarily excluded because of the likelihood the jury may misuse it." United States v. Johnson, 439 F.3d 884, 887 (8th Cir. 2006). However, such evidence may still be admitted if it is: "(1) relevant to a material issue raised at trial; (2) similar in kind and close in time to the crime charge; (3) supported by sufficient evidence to support a jury finding that the defendant committed the other act; and (4) its probative value is not substantially outweighed by its prejudicial value." Heidebur, 122 F.3d at 580.

Over 400 child erotica images were found on Fechner's SD card. Testimony at trial established that Fechner's BitTorrent download setting automatically saved downloads onto his phone, not the SD card. To place the items on the SD card, a user would have to manually copy the items from the phone. Because hash values and thumbnail images of deleted child pornography were also found on the SD card, the evidence is relevant to establish that Fechner knew about child pornography on the SD card. The sheer volume of these images that had to be moved manually onto the SD card makes it less probable that Fechner did not know what was on the SD card. The child erotica images are also relevant to establish a motive for possessing child pornography and rebut claims of accident or mistake. See United States v. Vosburgh, 602 F.3d 512, 538 (3d Cir. 2010) (finding the possession of child erotica suggested that the defendant harbored a sexual interest in children and tended to disprove any argument that he unknowingly or accidentally possessed child pornography images); see also United States v. Hansel, 524 F.3d 841, 846 (8th Cir. 2008) (finding possession of child erotica, as part of the totality of the circumstances, can establish probable cause that defendant had child pornography on his computer).

Fechner argues that the potential prejudice and the jury's likelihood to misuse propensity evidence outweigh any probative value. In United States v. Johnson, two pornographic stories found under Johnson's bed were admitted to demonstrate his interest in and predisposition to possess child pornography. 439 F.3d at 886. The court provided a limiting instruction that the evidence could be considered to prove Johnson's "inherent tendency to commit the acts charged in the Indictment." Id. We rejected the government's argument that it was admissible under Rule 404(b), finding that the stories added nothing to determining if Johnson inadvertently downloaded child pornography. Id. at 889.

In United States v. Evans, the district court admitted stories of adult men engaging in sexual acts with minors found on Evans' computer. 802 F.3d 942, 947 (8th Cir. 2015). The court noted that the systematic organization of the stories and images on various hard drives showed "more than sort of a casual attention to these items." Id. On appeal, we determined that the stories' presence in highly organized files by itself did nothing to rebut Evans' argument that a virus was responsible for placing the files on his computer. Id. We noted that the location of the stories plus evidence that Evans had accessed the folder would "tend to suggest Evans was aware of the stories," which would then "tend to refute his defense that he had no knowledge of any inappropriate materials" on his devices. Id. at 948.

The stories in Johnson and Evans were offered solely to establish an interest in young children. No other possibility existed for their usefulness at trial. Here, the child erotica's location in the same place where deleted child pornography hash values were found, and evidence that child erotica had to be manually moved to the SD card, was relevant to the jury's determination of whether Fechner knowingly possessed child pornography. While Fechner argues that the location of the images could not establish knowledge because they were inaccessible after deletion, we have permitted admission of such evidence when the files are inaccessible due to the defendant's action in deleting them. See United States v. Marmon, 674 F. App'x.

600, 602 (8th Cir. 2017) (unpublished). Admission of the child erotica images was permissible under Rule 404(b).

Even if there was error in admitting the child erotica images, it was harmless. While the content of the child erotica may suggest a sexual interest in children, that is not the sole purpose of the evidence. The jury saw only one image and the content of the images was not discussed at length. See Evans, 802 F.3d at 949 (finding the admission of propensity evidence harmless where the jury did not hear the content of pornographic stories and ample properly admitted evidence limited the stories' likelihood of influencing the jury's verdict). Any prejudice that resulted from admission of the child erotica images is harmless.

D. Jury Instruction

Fechner argues that the district court's limiting instruction regarding child erotica prejudiced him. He asserts that any "standard" instructions given at the end of trial were insufficient to undo the damage. Following presentation of the child erotica images, the court stated:

> Members of the jury, these particular exhibits are not child pornography. They're not admitted for the purposes of – the Government's not seeking a conviction on Counts 1, 2, or 3 based on them. They are offered to show the defendant's interest in young girls and the motivation for committing the crimes set forth in Counts 1, 2, or 3. Use them for any purpose consistent with that that you find helpful.

Although the phrasing of the limiting instruction is not a model of clarity, Fechner did not object to the limiting instruction at trial. Without an objection we review only for plain error. United States v. Poitra, 648 F.3d 884, 887 (8th Cir. 2011). To obtain relief under plain error, Fechner must show that there was an error, the error was clear or obvious under current law, the error affected his substantial

rights, and the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. Id. We are reluctant to disturb a conviction based on "a few isolated, allegedly prejudicial comments of a trial judge." Keys, 918 F.3d at 987 (internal quotation omitted). While a more precise instruction would have been desirable Fechner has not shown plain error.

More importantly the district court gave a standard 404(b) instruction as part of the final jury instructions, which we have previously determined cures unfair prejudice. United States v. Adams, 783 F.3d 1145, 1150 (8th Cir. 2015); see also Vosburgh, 602 F.3d at 538 (finding the risk of unfair prejudice from admitting child erotica images low because the district court instructed the jury that the defendant was not on trial for possessing child erotica and the images were not illegal). Fechner has not established that the final jury instructions were insufficient to cure any alleged prejudice. Nor has he shown a violation of his substantial rights or that any prejudice influenced the guilty verdict. See United States v. Carlson, 613 F.3d 813, 820-21 (8th Cir. 2010).

III. Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

KOBES, Circuit Judge, concurring in part and concurring in the judgment.

I join the majority's well-reasoned opinion on all but one issue. The district court erred by admitting non-pornographic images of children found on the SD card. Although the Government argues that these images show Fechner knowingly possessed child pornography, they were admitted as propensity evidence. The district court specifically instructed the jury to consider the images as evidence of "the defendant's interest in young girls and the motivation for committing [his] crimes." This is the same as evidence showing a defendant's "inherent tendency"

or "predisposition" to possess child pornography. See United States v. Johnson, 439 F.3d 884, 887 (8th Cir. 2006). I concur in the judgment because I agree the error was harmless in light of the "ample properly-admitted evidence that [Fechner] knowingly possessed child pornography." United States v. Evans, 802 F.3d 942, 949 (8th Cir. 2015).

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3711

United States of America

Plaintiff - Appellee

v.

Briand Daniel Fechner

Defendant - Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Des Moines
(4:17-cr-00112-JAJ-1)

JUDGMENT

Before ERICKSON, MELLOY and KOBES, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

March 12, 2020

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C

Adopted April 15, 2015
Effective August 1, 2015

Revision of Part V of the Eighth Circuit Plan to Implement the Criminal Justice Act of 1964.

V. Duty of Counsel as to Panel Rehearing, Rehearing En Banc, and Certiorari

Where the decision of the court of appeals is adverse to the defendant in whole or in part, the duty of counsel on appeal extends to (1) advising the defendant of the right to file a petition for panel rehearing and a petition for rehearing en banc in the court of appeals and a petition for writ of certiorari in the Supreme Court of the United States, and (2) informing the defendant of counsel's opinion as to the merit and likelihood of the success of those petitions. If the defendant requests that counsel file any of those petitions, counsel must file the petition if counsel determines that there are reasonable grounds to believe that the petition would satisfy the standards of Federal Rule of Appellate Procedure 40, Federal Rule of Appellate Procedure 35(a) or Supreme Court Rule 10, as applicable. *See Austin v. United States,* 513 U.S. 5 (1994) (per curiam); 8th Cir. R. 35A.

If counsel declines to file a petition for panel rehearing or rehearing en banc requested by the defendant based upon counsel's determination that there are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion to withdraw must be filed on or before the due date for a petition for rehearing, must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for rehearing, and must request an extension of time of 28 days within which to file pro se a petition for rehearing. The motion also must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for writ of certiorari.

If counsel declines to file a petition for writ of certiorari requested by the defendant based on counsel's determination that there are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for writ of certiorari.

A motion to withdraw must be accompanied by counsel's certification that a copy of the motion was furnished to the defendant and to the United States.

Where counsel is granted leave to withdraw pursuant to the procedures of *Anders v. California,* 386 U.S. 738 (1967), and *Penson v. Ohio*, 488 U.S. 75 (1988), counsel's duty of representation is completed, and the clerk's letter transmitting the decision of the court will notify the defendant of the procedures for filing pro se a timely petition for panel rehearing, a timely petition for rehearing en banc, and a timely petion for writ of certiorari.

UNITED STATES COURT OF APPEALS
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(4:17-cr-00112-JAJ-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Kelly did not participate in the consideration or decision of this matter.

April 16, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX D