STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2015AP1083-CR

GARY LEE WAYERSKI,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED IN DUNN COUNTY CIRCUIT COURT, HONORABLE WILLIAM C. STEWART, PRESIDING, AND ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR DUNN COUNTY CIRCUIT COURT, HONORABLE MAUREEN BOYLE, BARRON COUNTY CIRCUIT COURT, PRESIDING

DEFENDANT-APPELLANT'S CORRECTED BRIEF

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DEFENDANT-APPELLANT'S CORRECTED BRIEF

STATEMENT OF ISSUES

1. WAS WAYERSKI DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL?

The circuit court answered no.

2. DID THE TRIAL COURT ERR IN DENYING WAYERSKI'S MOTION FOR CHANGE OF VENUE?

The circuit court answered no.

3. DID THE TRIAL COURT ERR IN ADMITTING HOMOSEXUAL PORNOGRAPHIC PHOTOS, HOMOSEXUAL SADOMASOCHISTIC BONDAGE PORNOGRAPHY SEARCHES AND WEBSITE VISITS, AND HOMOSEXUAL SADOMASOCHISTIC TEXT MESSAGES?

The circuit court answered no.

4.DOES THE PROSECUTION'S BRADY,GIGLIO, KYLES VIOLATION WARRANT A NEW TRIAL?

The circuit court answered no.

5, WAS THE EVIDENCE INSUFFICIENT TO SUPPORT VERDICTS OF GUILTY FOR COUNTS 9-16 OF THE SECOND AMENDED INFORMATION?

The circuit court answered no.

6. SHOULD A NEW TRIAL BE GRANTED IN THE INTERESTS OF JUSTICE UNDER WIS. STATS., § 752.35?

Not decided by the circuit court.

STATEMENT OF THE CASE

By summons and criminal complaint filed on July, 28 2011, the State charged Gary L. Wayerski in a criminal complaint in Dunn County Case No. 11 CF 186 with seven felony counts involving sexual misconduct with two juvenile victims, JDP and JMH from March through the middle of July, 2011. (1:1-5) An initial appearance was held on the same day. (98:1-8; 2:1).

Following a preliminary hearing on August 9, 2009, probable cause was found. Wayerski was bound over for arraignment. (101:17). On August 16, 2011, an Information was filed charging Wayerski with fourteen felony charges involving sexual misconduct and assaults of two juvenile victims, JDP and JMH, from March through the middle of July, 2011. (102:1-11; 4:1-4).

On September 7, 2011, the State filed a motion to admit other acts evidence. (6:1-3). On October 13, 2011, a hearing was held regarding the state's motion to admit other acts as evidence. But the court did not decide the motion on that date. (104:1-25).

On November 9, 2011, Wayerski filed a motion for a change of venue or venire as well as an affidavit in support for motion for change of venue. (9:1; 10:1-23). On the same date, Wayerski filed a Motion in Limine (11:1-3). Wayerski filed a second Motion in limine on November 11, 2011.

(12:1-3). On November 16, 2011, the court denied the State's motion to admit other acts evidence and denied Wayerski's motion for a change of venue or venire. (105:1-33; 13:1; App. 1: 1-4).

An Amended Information was filed on March 26, 2012, charging Wayerski with a total of 16 felony offenses. The charges may be summarized as follows in the order listed in the amended information. The first count charges Wayerski with Child Enticement, a Class D felony, contrary to Wis. Stats. § 948.07(3)(a), on or about March of 2011 naming , JMH, a child as the victim; the second count charges Wayerski with Child Enticement, , a Class D felony, contrary to Wis. Stats. § 948.07(3)(a), on or about March of 2011 naming JDP, a child, as the victim; the third count charges Wayerski with Exposing Genitals or Pubic Area, a Class I felony, contrary to Wis. Stats. § 948.01(1)&(1)(a), by causing, JMH, a child to expose his genitals for purposes of sexual arousal or gratification on or about July 2011; the fourth count charges Wayerski with Exposing Genitals or Pubic Area, a Class I felony, contrary to Wis. Stats. § 948.01(1)&(1)(a), by causing, JDP, a child to expose his genitals for purposes of sexual arousal or gratification on or about March of 2011 to July 15, 2011; the fifth count charges Wayerski with Exposing a Child to Harmful Material, a Class I felony, contrary to Wis. Stats. § 948.11(2)(a), on or about March of 2011 to July 15, 2011 naming,

JMH, a child as the victim; the sixth count charges Wayerski with Exposing a Child to Harmful Material, a Class I felony, contrary to Wis. Stats. § 948.11(2)(a), on or about March of 2011 to July 15, 2011 naming , JDP, a child as the victim; the seventh count charges Wayerski with Causing Child Older than 13 to View/Listen to Sexual Activity, a Class H felony, contrary to Wis. Stats. § 948.055(1)&(2)(b), on or about March of 2011 to July 15, 2011 naming, JHM, a child as the victim; the eighth count charges Wayerski with Causing Child Older than 13 to View/Listen to Sexual Activity, a Class H felony, contrary to Wis. Stats. § 948.055(1)&(2)(b), on or about March, 2011 to July 15, 2011 naming, JDP, a child as the victim; the ninth count charges Wayerski with Sexual Assault of a Child by a Person Who Works or Volunteers With Children (Masturbation on futon with JMH present), a Class H felony, contrary to Wis. Stats. § 948.095(3)(a), on or about March, 2011 to July of 2011 naming, JMH, a child as the victim; the tenth count charges Wayerski with Sexual Assault of a Child by a Person Who Works or Volunteers With Children (Masturbation with ejaculation onto plate), a Class H felony, contrary to Wis. Stats. § 948.095(3)(a) on or about March, 2011 to July 15, 2011 naming, JDP, as the victim; the eleventh count charges Wayerski with Sexual Assault of a Child by a Person Who Works or Volunteers With Children (Masturbation while kneeling on table), a Class H felony, contrary to Wis. Stats. § 948.095(3)(a),on or about March, 2011 to July 15, 2011 naming,

JMH, a child as the victim; the twelfth count charges Wayerski with Sexual Assault of a Child by a Person Who Works or Volunteers With Children (Felatio) , a Class H felony, contrary to Wis. Stats. § 948.095(3)(a), on or about March, 2011 to July 15, 2011 naming, JDP, a child as the victim; the thirteenth count charges Wayerski with Sexual Assault of a Child by a Person, Who Works or Volunteers With Children (Masturbation on futon with JMH present), a Class H felony, contrary to Wis. Stats. § 948.095(3)(a) on or about March, 2011 to July 15, 2011 naming, JDP, a child as the victim; count fourteen charges Wayerski with Sexual Assault of a Child by a Person Who Works or Volunteers With Children (Touching testicles and penis during workout), a Class H felony, contrary to Wis. Stats. § 948.095(3)(a) on or about March, 2011 to July 15, 2011 naming, JDP, a child as the victim; count fifteen charging Wayerski with Sexual Assault of a Child by a Person Who Works or Volunteers With Children (Spanking buttocks with with metal spoon), a Class H felony, contrary to Wis. Stats. § 948.095(3)(a) on or about March, 2011 to July 15, 2011 naming, JMH, a child as a victim; count sixteen charging Wayerski with Sexual Assault of a Child by a Person Who Works or Volunteers With Children (Spanking buttocks while JDP was laying on defendant's lap), a Class H felony, contrary to Wis. Stats. § 948.095(3)(a) on or about March, 2011 to July 15, 2011 naming, JDP, a child as the victim. (16:1-5). On March 26, 2012, a

pre-trial hearing was also held at which time the amended information was discussed. (109:1-6).

On June 20, 2012, Wayerski filed a motion for individual voir dire, motion for continuance, motion for recusal of the prosecutor and a motion in limine. In particular, Wayerski's motion in limine requested exclusion from evidence photos taken from Wayerski's computer and phone. (18:1; 19:1; 20:1-2; 21:1). On June 25, 2012, the State filed a motion in limine to preemptively exclude speculative and hearsay testimony and to admit panorama or, in the alternative, other acts evidence. (27:1-3). On the same date, the State filed a motion for leave to amend the first amended information. (29:1-2). On June 25, 2012, the Court addressed in a general sense Wayerski's motion in limine to exclude from evidence photos taken from Wayerski's computer and phone, but did not make a formal decision excluding the photos or allowing the photos. The Court at that point had not viewed the photos from either the computer or the cell phone. Wayerski's motion for recusal of prosecutor was denied at the same hearing. Next, the Court considered the State's request to admit panorama evidence. The State was vague in its description of this evidence. Wayerski entered a general objection to admission of this evidence because there was a "lack of definition" by the State as to this evidence. The Court indicted its willingness to admit this type of evidence to provide the jury with "context". The Court declined to grant the State's motion to preemptively exclude

speculative and hearsay testimony. (19:1; 20: 1-2; 111:1-49; App 2: 1-6; App. 8: 1-13). On September 14, 2012, a pre-trial conference was held. (113:1-9). On September 17, 2012, Wayerski filed another motion in limine requesting a ruling as to which of the 30 photos is admissible at trial. Wayerski also objected to publication of the photos to the jury in media format. Wayerski argued that only "hard copy" versions of no more than 3 or 4 photos should be shown to the jury because to do otherwise would "inflame the passions of the jury resulting undue prejudice". (31:1). On September 17, 2012, by letter trial counsel asked the court to reconsider its decision on the motion for change of venue in light of a change of venue granted in another Dunn County Case. (124; App. 3A: 1). The Court entered an Order and Decision on September 21, 2012 denying reconsideration of Wayerski's previous request for a jury pool from outside of Dunn County and directing the State to submit to the Court the "30 photos" in question for an in camera inspection in digital and print format. (32:1-2; App. 3: 1-2).On September 22, 2012, the State filed an 2nd Amended an Information. This Information charged Wayerski with the same 16 counts set forth in the Amended Information filed on March 26, 2012. The only change related to the dates of the offenses. In this new Information, each offense was said to have been committed by Wayerski "between March of 2011 through July 16, 2011." (16: 1-5; 28:1-5).

Following a trial held from October 8, 2012 to October 12, 2012, the jury returned guilty verdicts on all sixteen counts in the 2nd Amended Information. (97; 119:123-128). On January 9, 2013, the Dunn County Circuit Court, Honorable William C. Stewart, presiding, sentenced Wayerski to a total of 14 years initial confinement and 16 years of extended supervision. As to count one, the defendant was sentenced to 7 years initial confinement and 8 years extended supervision. As to count two, the defendant was sentenced to 7 years initial confinement and 8 years extended supervision, to be served consecutively to count one. As to counts three and four, the defendant was sentenced to 1 year of initial confinement for each count and 2 years of extended supervision for each count, to be served concurrent with count one. As to counts five and six, the defendant was sentenced to 1 year of initial confinement for each count and 2 years of extended supervision for each count, to be served concurrent with count one. As to counts seven and eight, the defendant was sentenced to 3 years of initial confinement for each count and 1 year of extended supervision for each count, to be served concurrent with count one. As to counts nine through sixteen, the defendant was sentenced to 3 years of initial confinement for each count and 3 years of extended supervision for each count, to be served concurrent with count one. The Judgement of Conviction was entered by the Dunn County Clerk of Circuit Court on January 9, 2013. (38:1-8; 120:1-75 App. 4: 1-8).

On May 28, 2014, Wayerski filed a motion for post-conviction relief requesting a new trial, pursuant to § 809.30, Wis. Stats, and affidavit in support of the post-conviction motion. (56: 1-4; 57:17; App 5: 1-21). The Honorable Maureen D. Boyle, Circuit Court Judge for Barron County, presided over all three post -conviction motion hearings. (121: 1-162; 122:1-84; 123:1-144). The first post-conviction motion hearing was held on December 29, 2014. Attorney Lester Liptak, Wayerski's trial counsel and Wayerski testified. (121: 1-162). On February 2, 2015, Wayerski filed a Post-Hearing Brief . (86:1-6). On February 23, 2015, the State's Response Brief was filed . (88:1-24). On March, 06, 2015, the second post-conviction motion hearing was held. Eau Claire County Sheriff Department Deputy Scott Kuehn testified. (122:1-84). On May 4, 2015, at the final hearing on the post-conviction motion, the court denied the motion for new trial. (123:1-144; App 6: 1-104). On May 14, 2015, a written Order denying the motion for post-conviction relief, signed by the Honorable Maureen D. Boyle, Barron County Circuit Court, was entered in the Dunn County Circuit Court. (94:1-4; App 7:1-4). On May 22, 2015, Wayerski timely filed a Notice of Appeal from the Judgement of Conviction and Order denying his post-conviction motion. (95:1-5). Wayerski continues to serve his sentence of imprisonment. This appeal follows.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Wayerski does believe oral argument would be helpful to the Court in this case. Publication of an opinion on this case would be helpful to the development of the law related to ineffective assistance of counsel, change of venue motions and *Brady/Giglio/Kyles* violations.

STATEMENT OF FACTS

In the fall of 2010, when JDP was 16, he met Gary Wayerski, police chief for the town of Wheeler. Sometime after they met, JDP committed a theft at a local church. Although JDP was never formally adjudicated guilty of the theft, a probation officer was involved. JDP's supervision was informal. Wayerski knew his probation officer. Wayerski acted as a mentor during his period of supervision. Wayerski spoke to JDP and his parents about mentoring JDP at this time. Everyone agreed to this arrangement. (116:5-13).

Between March and July 16, 2011, JDP, a juvenile, claimed that Wayerski had sexual contact with him on multiple occasions at Wayerski's apartment in Menomonie, Wisconsin, often masturbating him to the point of ejaculation, spanking him at Wayerski's apartment and spanking him while on a long distance road trip when he accompanied Wayerski driving a semi truck. JDP

further claimed that Wayerski performed oral sex on him during this same period of time in Wayerski's apartment. Wayerski and JDP also watched pornography on multiple occasions during the same time period in Wayerski's apartment. Finally, JDP related that there were times he and his friend JMH, another juvenile, would both watch pornography with Wayerski and Wayerski would grab their penises and masturbate both of them. On one occasion, JDP said the Wayerski asked him to ejaculate onto a plate. At that time, Wayerski masturbated JDP and JDP masturbated himself until he ejaculated onto the plate.. During this entire period, Wayerski was employed as a police officer. JDP's testimony is completely lacking in any specifics as to time and dates of all these occurrences. JDP never reported any of these occurrences to law enforcement until July 16, 2011. (116: 5-66).

In March 2011, JMH, at age 17, committed a theft from a church. Wayerski issued a disorderly conduct ticket to him. However, JMH stated he worked it out with Wayerski and he was required to perform ten hours of community service. JMH was on a "probation type deal for about six month" and was to "keep himself out of trouble". Wayerski was to supervise him on probation. Wayerski told JMH "if I did what I was told with the community service and the six month of staying out of trouble, that it would be off my record completely". Wayerski was the Chief of Police in Wheeler, Wisconsin. (116: 127-134).

Between March and July 2011, JMH spent time with Wayerski at Wayerski's apartment. During this period, JMH claimed Wayerski had sexual contact with him and masturbated him. On one occasion, JMH accompanied Wayerski on a road trip while Wayerski drove a semi truck. At some point, Wayerski pulled the semi truck over and parked at a rest stop. There JMH claimed Wayerski masturbated him and rubbed his testicles. Wayerski on other occasions spanked him with a spoon. During the spankings, JMH was bent over a chair. Wayerski also had JMH get up on a table on his arms and legs, "doggy style". Wayerski would then place Vaseline on his hand and masturbate JMH. Wayerski called these events "milking me out". Wayerski and JMH also watched pornography at Wayerski's apartment. JMH described the pornography as "woman on man or man on woman". In the pornography, people were engaged in sexual acts with each other. JMH recalled that he and Wayerski watched pornography on a website called "Porn Hub". At times, while they were viewing pornography, JMH claimed Wayerski masturbated him. JMH also claimed that Wayerski provided alcohol to him and his friend JDP while at Wayerski's apartment. Wayerski's sexual contact with JMH occurred on multiple occasions. Additionally, JMH claimed that Wayerski masturbated JMH and JDP at the same time as he sat between both of them. JMH believed this last incident occurred the night before JMH and JDP reported Wayerski's sexual acts to his parents and law enforcements. JMH and JDP got into an

argument with Wayerski at his apartment during their last visit at the apartment. JMH's testimony is completely lacking in any specifics as to time and dates of all these occurrences. JMH never reported any of these occurrences to law enforcement until July 16, 2011. (116: 134-182).

In order to avoid a conflict of interest, investigation of the case was assigned to Eau Claire County Sheriff's Office rather than any Dunn County Law Enforcement in light of Wayerski's position as police officer and police chief in towns in Dunn County. On July 16, 2011, Detective Kuehn interviewed separately JDP and JMH regarding their allegations against Wayerski. Eventually he obtained a search warrant to search Wayerski's apartment and executed the search warrant. Recovered from Wayerski's residence were, among other items, a bottle of Vaseline, dog leashes, and a plate. The plate contained "a milky substance consistent with the cracking of an egg". The plate was found on the top of a clothes basket that was next to the kitchen table. He also observed a half-pint of alcohol. (116:201-237). Detective Kuehn also seized a computer from Wayerski's apartment and another computer which was taken apart in various pieces on the floor in Wayerski's master bedroom. He also recovered a copy of a Charter bill. The bill indicated that Wayerski was the account holder related to on-demand or pay-per-view matters. This same bill indicated the dates and names of pornography accessed. (116:201-237).

Extensive evidence of homosexual pornographic photos, homosexual sadomasochistic bondage pornography searches and website visits, photos of Wayerski's penis, and homosexual sadomasochistic texts from Wayerski's computers and his cell phone were admitted into evidence, seen by the jury and described to the jury. (97; 117: 101- 117, 109; 117: 89-101)

Sarah Zastrow-Arkens, a DNA analysist with the Wisconsin State Crime Laboratory, examined bucal swabs from Wayerski, JDP and JMH. She was able to obtain a male profile from non-sperm and sperm fractions from two separate swabbings of the plate recovered from Wayerski's apartment. Wayerski and JMH were excluded as being the possible source of the profile detected from the plate. That DNA profile matched JDP. The statistical likelihood that anyone else could have contributed that DNA was one in 28 quintillion. (97;116:212-215,: 117: 75-85).

Kay Detar testified that the boys were drinking and using Wayerski's computer without Wayerski's knowledge. Moreover JDP admitted to Detar after Wayerski's arrest that "what they said to the cops was a lie". (118: 10-18). Tiffany Mullan testified that JDP told her that all of the allegations against Wayerski were a "joke" and a "misunderstanding". (118: 33-37). Allan Meyer recounted how the boys told him that "We set him up. We got him". In particular, JDP told Meyer that "[W]e got him. We

ended up setting him up.". Wayerski was " too nosy". The boys did what they did because of drugs. (118: 45-49).

Wayerski, Village of Wheeler Police Chief and Part Time Police Officer for the Village of Boyceville, maintains he is innocent of all charges and all of the accusations of spanking, sexual assault, and showing the boys pornography. JMH and JDP had set him up and others had set him up. He also denied providing the boys with alcohol. Wayerski admits poor judgement for allowing the victims, JDP and JMH, to consume alcohol at his residence, but denies ever engaging in sexual conduct with them. (118:77-201).

On rebuttal, a jail inmate, John Clark testified that Wayerski had confided in him, and Wayerski had confessed to committing sexual assaults of JDP and JMH. Clark also stated that Wayerski admitted he was aware of the viewing of pornography in his home by JDP and JMH. Clark was asked if he came forward to obtain some benefit for his testimony. He denied wanting any benefit. He seemed to suggest his motivation was outrage that the victims were kids. Clark said, "They're kids. I think that says it all." (118: 215-226, 224, 226).

Wayerski was the last witness called at trial. He was recalled to the stand after Clark had testified. Trial counsel never asked him whether he confided and confessed to Clark that he had sexually assaulted the boys, JDP and JMH, and

allow them to view pornography. Trial counsel failed to ask Wayerski whether he had told Clark any of the matters about which Clark testified. (118:233-234).

Following a jury trial held from October 8, 2012 to October 12, 2012 in the Circuit Court of Dunn County, the jury returned guilty verdicts on all sixteen counts in the 2nd Amended Information. (97; 119:123-128). On January 9, 2013, the Dunn County Circuit Court, Honorable William C. Stewart, presiding, sentenced Wayerski to a total of 30 years in a Wisconsin State Prison, 14 years initial confinement followed by 16 years of extended supervision. The Judgment of Conviction was entered by the Dunn County Clerk of Circuit Court on January 9, 2013. (38:1-8; 120:1-76; App. 4: 1-8).On May 28, 2014, Wayerski filed a motion for post-conviction relief, pursuant to § 809.30, Wis. Stats. (56:1-4;7:17; App 5: 1-21). On May 4, 2015 the final hearing on the motion for postconviction relief was held. The parties presented oral arguments. Honorable Maureen D. Boyle, Barron County Circuit Court, presiding, made an oral ruling from the bench denying the defendant's § 809.30, Wis. Stats. motion for new trial. (123:1-144 App. 6: 1-98). On May 14, 2015, an Order denying the motion for post-conviction relief was entered. (94:1-4; App 7:1-4). On May 22, 2015, Wayerski timely filed a Notice of Appeal from the Judgement of Conviction and Order

denying his post-conviction motion. (95:1-5). Wayerski continues to serve his sentence of imprisonment. This appeal follows.

Further facts will be discussed where necessary below.

ARGUMENT

I. WAYERSKI WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Standard of Review:

The standard of review for assessing whether a defendant has been denied his right to ineffective assistance of counsel may be stated as follows. The trial court's resolution of an ineffective-assistance-of-counsel claim presents mixed questions of law and fact. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The trial court's findings of fact will not be disturbed unless they are clearly erroneous. *Id*. Whether the lawyer's performance was deficient and prejudicial are questions of law which appellate courts review *de novo*. *Johnson,* 153 Wis. 2d at 128.

According to *Strickland v. Washington*, 466 U.S. 668 (1984), in order for a defendant to prevail on a claim of ineffective assistance of counsel, he is required to show that trial counsel's performance was deficient, and that the deficient performance prejudiced defendant or undermined confidence in the outcome of the trial. The *Strickland* test was adopted discussed by the Wisconsin Supreme Court in *State v. Ludwig*, 124 Wis.2d 600, 369 N.W.2d 722 (1985) and *State v. Pitsch*, 124 Wis.2d 638, 369 N.W.2d 711 (1985).

"Deficient performance" measures whether counsel's representation "fell below an objective standard of reasonableness." *State v. Johnson*, 133 Wis.2d 207, 217, 395 N.W.2d 176 (1986). The "prejudice" prong measures whether "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Johnson*, 133 Wis.2d at 222, quoting *Strickland*, 466 U.S. at 687.

Wayerski requests reversal of his conviction and a new trial because his constitutional right to effective assistance of counsel, guaranteed by the 6th Amendment and 14th Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution, was denied. Wayerski submits that there was no legitimate tactical basis for the following conduct and omissions of his trial counsel, and that such conduct and omissions were unreasonable under prevailing professional norms

and that Wayerski's right to a fair trial was prejudiced by them.

On rebuttal, the State called a jail inmate, John Clark. He testified that Wayerski had confided in him, and Wayerski had confessed to committing sexual assaults of JDP and JMH. Clark also stated that Wayerski admitted he was aware of the viewing of pornography in his home by JDP and JMH. Clark was asked if he came forward to obtain some benefit for his testimony. He denied wanting any benefit. He seemed to suggest his motivation was outrage that the victims were kids. Clark said, "They're kids. I think that says it all." (118: 215-226).

Wayerski was the last witness called at trial. He was called on surrebutal right after the testimony of Clark. But his attorney never asked him the most important question. Did you confide and confess to Clark you had sexually assaulted the boys, JDP and JMH, and allowed them to view pornography? Put another way, Did you confide anything about your case to Clark? (118:233-234).

Trial counsel failed to ask questions of Gary Wayerski on surrebuttal that would have rebutted the false claims of John R. Clark in his rebuttal testimony. (118:215-234; 56:1-4). Trial counsel admitted that he should have asked questions that allowed Wayerski to rebut the allegation by Clark. (121:108). Wayerski was never asked if he confided

in Clark and confessed to having committed the sexual crimes against JDP and JMH. The jury was left with the impression that Clark's testimony must be true. (121:126-128)

To his credit, trial counsel's forthright testimony at the post-conviction hearing compellingly confirms the argument that his performance was deficient and Wayerski was prejudiced . (121: 6-126). He could think of no reason why he did not ask such questions. (121: 6-22,79-90, 117-126) Gary Wayerski also testified. He said in no uncertain terms that he never confessed committing the crimes against Josh H. and Josh P. to John Clark when they were housed together in the Chippewa County jail. He would have told the jury that he never confided or confessed to John Clark that he committed the crimes if he had only been asked by trial counsel when he testified on surrebuttal. Trial counsel failed to ask him these questions. (121:126-128).

In ruling on the defendant's motion for a new trial, The circuit court said that the only error on trial counsel's part that "caused me to pause" was this one. Nevertheless the court denied Wayerski's motion on this point because the court found the evidence against Wayerski to be overwhelming. even if Mr. Wayerski had been allowed to deny confiding and confessing to John Clark, the circuit concluded that the outcome would not have been different. (123: 80-84).

The circuit court's reasoning on this point is erroneous. In determining whether an ineffective assistance of counsel claim should warrant a new trial, the test is not strictly outcome determinative. In short, the test is not simply whether the outcome would have been different. The correct test is one that requires the circuit court to assess whether confidence in the outcome is warranted. Put another way, a defendant raising a claim of ineffective assistance of counsel does have to show that but for the error the verdicts would have been different. In order to prove prejudice, the defendant only has to show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *State v. Johnson*, 133 Wis.2d 207, 222, 395 N.W.2d 176 (1986) quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

In this case, the failure to ask Wayerski questions affording him the chance to deny a confession to Clark not only denied his right to effective assistance of counsel, but also denied him his right to present a defense. The right to present a defense is grounded in the confrontation and compulsory clauses of the United States Constitution and Article I, Section 7 of the Wisconsin Constitution and includes the right to present testimony of favorable witnesses. *See State v. Pulizzano,* 155Wis. 2d 633, 645-66, 456 N.W.2d 325 (1990). The most favorable witness in surrebuttal was Wayerski himself. Trial counsel's failure to ask him questions to rebut Clark's

falsehoods irreparably deprived Wayerski of a fair trial. The absence of Wayerski's denial of Clark's confession story was tantamount to an admission of guilt. Clearly Wayerski's right to a fair trial was prejudiced by his trial counsel's error. Therefore it cannot be said that Wayerski had a "trial whose result is reliable." *Johnson*, 133 Wis.2d at 222.

The failure of trial counsel to move for a mistrial after admission of the homosexual pornographic photos, homosexual sadomasochistic bondage pornography searches and website visits, photos of Wayerkski's penis and homosexual sadomasochistic texts from his computers and cell phones was deficient; he recognized the unfairly prejudicial nature of the evidence by previously filing a general motion in limine to keep out such evidence and arguing that the evidence was inflammatory. **(**97; 116: 201-237; 117: 89-197, 109, 101- 117).

On May 4, 2015 the final hearing on the motion for postconviction relief was held. The parties presented oral arguments. Honorable Maureen D. Boyle, Barron County Circuit Court, presiding, made an oral ruling from the bench denying the Wayerski's § 809.30, Wis. Stats. motion for new trial. (123:1-144; App 6:1-104).

Judge Boyle was not persuaded by any of the arguments advanced by Wayerski that he was denied effective assistance of counsel. *Id.* On May 14, 2015, an Order denying the motion for post-conviction relief was entered. (94:1-4; App 7:1-4).

II. TRIAL COURT ERRED IN DENYING WAYERSKI'S MOTION FOR CHANGE OF VENUE.

Standard of Review:

Change of venue motions are a matter of discretion; appellate courts will not reverse a decision on such a motion unless there has been a misuse of discretion. *See State v. Albrecht,* 184 Wis. 2d 287, 306, 516 N.W. 2d 776 (Ct. App. 1994)

The question is whether there is a reasonable likelihood of community prejudice so pervasive as to the preclude the possibility of a fair trial. *Id.* at 306. Courts consider the following factors:

> (1) the inflammatory nature of the publicity; (2)the timing and specificity of the publicity; (3) the degree of care exercised, and the amount of difficulty encountered, in selecting the jury; (4) the extent to which the jurors were familiar with the publicity; (5) the defendant's utilization of peremptory and for cause challenges of jurors; (6) the State's

> participation in the adverse publicity; (7) the severity of the offense charged; and (8) the nature of the verdict returned.

Id.; see also *State v. Fonte*, 2005 WI 77, ¶31, 281 Wis. 2d 654, 698 N.W.2d 594.

On November 9, 2011, a motion for a change of venue or venire was filed by Wayerski as well as an affidavit in support for motion for change of venue. (9:1; 10:1-23). The affidavit detailed extensive newspaper articles as well as information found in search engines, on facebook and social media. The matters set forth in the affidavit and argued by trial counsel at the motion hearing amply confirmed why a change of venue was necessary or in the very least the venire be impaneled from a different county. (9:1; 10:1-23). Dunn County is not New York City. Word of these accusations traveled fast. And prejudicial opinions were formed early on. At a motion hearing on November 16, 2011, The court denied Wayerski's motion for a change of venue or venire. (105:1-33; App. 1: 1-4). On September 17, 2012, by letter trial counsel asked the court to reconsider its decision on the motion for change of venue in light of a change of venue granted in another Dunn County Case. (124; App. 3A: 1) The court summarily denied reconsideration of the motion for change of venue in a written decision on September 21, 2012. (32; App.3:1-2).

The severity and number of charges attracted widespread coverage of the case as evinced by Wayerski's affidavit in support of the change of venue motion and his arguments at the motion hearing. Wayerski became a person of notoriety given his previous employment in law enforcement. In this respect, Wayerski has identified a number of news reports that fall on the high end of what might be viewed as objectionable. (9:1; 10:1-23) The circuit court erred by denying his request for a change of venue. (105:1-33; App. 1:1-4; 3:1-2)

Perhaps the most compelling evidence that a change of venue motion should have been granted in this case was made obvious during jury selection. No less than twenty jurors had familiarity with the case by having read about it or heard about it in the media. Most of them heard about the case from newspaper accounts. Some of the jurors had to be excused for cause during jury selection because they could not be fair based on what they heard in the community and news accounts of Wayerski's case. (115: 13-198). At least three of those jurors familiar with the media accounts were selected to decide the case. (115:13-198).

III. TRIAL COURT ERRED IN ADMITTING HOMOSEXUAL PORNOGRAPHIC PHOTOS, HOMOSEXUAL SADOMASOCHISTIC BONDAGE PORNOGRAPHY SEARCHES AND WEBSITE VISITS, AND HOMOSEXUAL SADOMASOCHISTIC TEXT MESSAGES

Standard of Review:

The admission of evidence is within the discretion of the trial court. *See State v. Pharr* **,** 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). Appellate courts review a trial court's rulings on the admissibility of evidence for an erroneous exercise of discretion. *Id.* To sustain a discretionary ruling, an appellate court need only find that the trial court examined the relevant facts, applied a proper standard of law, and using a rational process, reached a reasonable conclusion. *Franz v. Brennan*, 150 Wis. 2d 1, 6, 440 N.W.2d 562 (1989). "In determining a dispute concerning the relevancy of proferred evidence, the question to be resolved is whether there is a logical or rational connection between the fact which is sought to be proved and a matter of fact which has been made an issue in the case." *State v. Alsteen*, 108 Wis. 2d 723, 729-30, 324 N.W.2d 426 (1982) (citation omitted). Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of

confusion of issues, inflaming the juror's passions or unfair prejudice. Wis. Stat. § 904.03.

On October 4, 2012, a motion hearing was held regarding the admissibility of the pornographic "30 photos" . The State argued that were advanced to admit the photos to show intent, motive and modus operandi as context evidence or other acts evidence. State also argued that the photos are relevanct to prove that the "images that they [JMH and JDP] were exposed to were harmful materials". Wayerski opposed admission of the photos stressing that the photos may not be relevant and the pornographic nature of the photos is inflamatory and unfairly prejudicial. The Court considered the arguments of the parties, but did not issue a definitive decision on the question of admissibility. However, the Court did rule if the photos are admitted, the print form photos will be admitted. (27:1-3; 33:1-2; 114: 1-32 App. 9: 1-19).

Testimony was received at trial regarding the following irrelevant, inflammatory and unfairly prejudicial matters. A Charter bill which showed that Gary Wayerski was the account holder. The bill indicated on-demand or pay-per-view matters. This same bill indicated the dates and names of the following movies: "PH Pets, MILF sex", May 19; "Juicy", PPV movie, May 19, 3:30 a.m.; "Juicy", PPV movie, May 19, 5:00 a.m.; "Real XX Five", PPV movie, May 19, 1:30 a.m.; "Triple Hard Core", May 31, 12:42 a.m.. (116:201-237). The contents of computers found in Wayerski's apartment comprised

approximately 100,000 images containing pornography . Approximately 90 pornographic videos were found. The majority of the pornograhic materials involved nude male/male activities, including bondage, and spanking and sadomasochistic acts. The majority of the images were teen age boys with an age range of 16 to 20 years old. (117: 89-154). Outside the presence of the jury, over Wayerski's objection, the circuit court decided to permit the State to introduce into evidence nine pornographic photos involving young boys, in nude poses, some being spanked, some in jail settings or prisoner settings as exhibits 27, 28,29, 30, 31, 32, 33, 34 and 35. (97; 117: 101- 117, 109; 117: 89-101; App. 10: 1-17). The circuit court noted the neither JDP nor JMH testified that Wayerski had shown them theses photos and no evidence that either boys had accessed these photos on Wayerski's computer. (117:109). The photos, exhibits 27, 28,29, 30, 31, 32, 33, 34 and 35, were admitted into evidence and the jury saw these photos and what was depicted was described at length..(97; 117: 117-131). Four Yahoo IM chat logs with the name dairymilkfarmer123yahoo.com., attributed to Wayerski were also admitted and described for the jury. These IM chats are with other males and involve homosexual sadomasochistic expressions on the part of Wayerski and the participants. These chats were admitted into evidence as exhibit 36 and 37 (97; 117: 117-141). The jury also heard that Wayerski's computers contained bestiality pornography, videos, the graphic titles of

pornography such as old pervert sex son daddy fuck young gay boys videos porn galeries, dad and son, dad fuck twinks movies, daddy with young son video clips, old dad fuck his boy by young dick videos as well as titles of other pornography items such as hot, milking, ass, stinking animal, female, punish gaze, Romanian shit boy, degrading, punish. Other titles of pornography entitled young guy, slave boys, torture, leather, bondage, spanking, young naked boys, hot naked teen boys on gay video found on Wayerski's computers were heard by the jury. (97; 117: 117-154). No evidence was received that the boys, JDP and JMH, were shown the IM yahoo chats or any of these other pornography items. (116: 5-66,134-182).

Wayerski was cross-examined extensively about a photos of naked boys or men in a jail setting (97;exhibit 27); a photo of naked boys posing as prisoners with a guard (97;exhibit 28); photo of a naked boy in a locker room setting being spanked with two girls looking on (97;exhibit 29); photo involving the spanking of a young boy (97;Exhibit 30); as well other pornographic photos of young boys. (97;Exhibits 31, 32, 33 34 and 35). One of the photos contained a stamp entitled "teens-boys world. com". All of these images came from Wayerski's computers. He was also questioned extensively about his bisexual status, interest in pornography, lurid chat messages of a homosexual nature with other men, as well as photos of his head and chest

and penis taken from his cell phone. (97; 118:77-201).

Trial counsel did file a general objection to the admission of pornographic photos by way of two motions in limine. (19; 31). Again in trial, he registered another general objection to the admission of pornographic images at trial. The circuit court in the midst of trial overruled the objections and admitted pornogrpahic photos and text messages introduced by the State. (117: 101-117; App 5:101-117). Trial Counsel should have objected and moved for mistrial when the trial court erred in allowing introduction into evidence of all of the homosexual pornographyand texts. There was no nexus between the photos and texts introduced and the claims of the accusers, JH and JP, because the accusers were never asked if these photos were specifically shown to them. The accusers never said that these photos or texts were the texts that they were shown by Wayerski. JMH and JDP described only viewing heterosexual pornography, not homosexual pornography. (116: 5-66, 127-134) Even the circuit court in its decision admitting the pornography and the text messages into evidence recognized that neither JDP nor JMH claimed to have seen or accessed this type of pornography. (117: 109) The sexually graphic texts were not between Gary Wayerski and the accusers, JH and JP. In particular, photos showing sadomasochistic activity and bondage acts should not have been admitted. Sexually graphic texts authored by Gary

Wayerski and others should not have been admitted. Nor should any photos taken from Wayerski's cell phone showing private parts or any other sexually graphic material have been admitted into evidence. See Wis. Stats. §§ 904.01, 904.03 and 904.04. (117: 89-197).

Only relevant evidence is admissible . See § 904.01,Wis. Stats.. Even if deemed relevant, the probative value of this purported evidence is substantially outweighed by the unfair prejudice to the defendant caused by the introduction of this evidence. See Wis. Stats., 904.03. Furthermore, other acts should be excluded from evidence because they amount to improper propensity and improper character evidence. See, § 904.04(2), Wis. Stats.. Evidence only introduced to make the accused look like a "bad person", and thus constituting inadmissible character evidence , is barred under the strict prohibitions set forth in § 904.04(1) and (2),Wis. Stats..

Before ruling on the admissibility of "other acts" evidence, a trial court must engage in a three step analysis and "carefully articulate" its reasoning on the record. The three steps require the court to (1) determine whether the evidence is offered for an acceptable purpose under § 904.04(2), Wis. Stats., such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident; (2) determine relevancy by (a) first deciding whether the evidence relates to a fact

or proposition that is of consequence to the determination of the action, and (b) deciding whether the evidence has probative value, i.e. whether the evidence has a tendency to make the consequential act or proposition more probable or less probable than it would be without the evidence; and (3) determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, etc., under § 904.03, Wis. Stats.. *State v. Sullivan*, 217 Wis.2d 768, 773-74, 781-92, 576 N.W.2d 30 (1998). "The general policy of § 904.04(2) is one of exclusion; the rule precludes proof of other crimes, acts or wrongs for purposes of showing that the a person acted in conformity with a particular disposition on the occasion in question." *State v. Johnson*, 184 Wis.2d 324, 336-37, 516 N.W.2d 463 (Ct. App. 1994).

Improper character evidence is barred because its admission into evidence will create a serious risk that the jurors will find the defendant guilty not because they believe he or she committed the crime charged, but rather because they think the defendant is an antisocial person who should be in prison. In 1997, the Supreme Court acknowledged that evidence of a defendant's bad character has the potential to "lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 117 S.Ct. 644 (1997).

> Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it is appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.

State v. Davidson, 2000 WI 91 ¶53, 236 Wis. 2d 537, 613 N.W.2d 606, ¶73 (citations omitted).

Here the court erred because this evidence was so revolting and horrific and unnecessarily extensive that unfair prejudice substantially outweighed the need to admit the homosexual pornographic photos, homosexual sadomasochistic bondage pornography searches and website visits, photos of Wayerkski's penis and homosexual sadomasochistic texts from his computers and cell phones. The evidence was unnecessary to prove intent, motive or absence of a mistake or accident, nor was this evidence necessary to show knowledge. The evidence was also unnecessary to show panorama, context or background. The court's failure to give the jury the cautionary instruction, Wisconsin Jury Instruction-Criminal 275 contributed to the error. The court never offered to give this instruction.

n the absence of the cautionary instruction, WIS JI-Criminal 275, the jury was never informed that they could not convict Wayerski because they believed he was a "bad person".

Wayerski argues that there was no probative value to any of the homosexual pornographic photos, homosexual sadomasochistic bondage pornography searches and website visits, and homosexual sadomasochistic texts evidence and there was a danger that the jury would be so revolted by it that it would decide he was a sexual deviant and convict him on that basis. The trial court erroneously exercised its discretion in allowing any of this evidence to be seen by the jury and described in detail by witnesses. **(**97; 116: 201-237; 117: 89-197, 109, 101- 117).

IV. THE PROSECUTION'S BRADY, GIGLIO KYLES VIOLATION WARRANTS A NEW TRIAL.

Standard of Review:

The State has two separate evidence-disclosure responsibilities: a statutory responsibility imposed by Wis. Stat. §971.23 and a constitutional responsibility imposed by *Brady v. Maryland* 373 U.S. 83 (1963). Section 971.23(1) identifies what the State must disclose to a defendant. If the State does not show good cause for failing to disclose the information, the reviewing court must determine

whether the defendant was prejudiced, applying the harmless error test. *See State v. Harris*, 2008 WI 15, ¶¶15, 41-42, 307 Wis. 2d 555, 745 N.W.2d 397. Whether a defendant has been prejudiced presents a question of law subject to an appellate court's independent review. *Id.*, ¶15.

Under *Brady*, "a defendant has a constitutional right to evidence favorable to the accused and that a defendant's due process right is violated when favorable evidence is suppressed by the State either willfully or inadvertently, and when prejudice has ensued." *Harris*, 307 Wis. 2d 555, ¶61. "Prejudice means that 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Id. (Citations and one set of quotation marks omitted). Harris continued: "'[S]trictly speaking, there is never a real *Brady* violation unless the non-disclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict'" *Harris*, 307 Wis. 2d 555, ¶61. (Citations and one set of question marks omitted).

On rebuttal, the State called a jail inmate, John R. Clark. He testified that Wayerski had confided in him, and Wayerski had confessed to committing sexual assaults of JDP and JMH. Clark also stated that Wayerski admitted he was aware of the viewing

of pornography in his home by JDP and JMH. Clark was asked if he came forward to obtain some benefit for his testimony. He denied wanting any benefit. He seemed to suggest his motivation was outrage that the victims were kids. Clark said, "They're kids. I think that says it all." (118: 215-226,219, 224, 226).

The *Brady* violation here was based on the knowing failure by the prosecution to disclose to trial counsel prior to trial that Clark was being prosecuted by the State in another county for sex crimes and other crimes. Wayerski's trial counsel was deprived of a valuable opportunity to impeach the credibility of Clark and illustrate through cross examination Clark's desire to curry favor with the prosecution. ((84:1- 5; 85:1-4; 86:1-6; 88: 1-24; 118: 215-231; 121: 6-22, 79-90, 87-89, 117-126,126-128; 122:18-43).

To be even more specific, Clark, the jail house snitch, unbeknownst to Wayerski's lawyer, had pending charges against him in Chippewa County Circuit Court for the following offenses: one count of Causing a Child 13-18 to View Sexual Activity, a class H Felony, contrary to Wis. Stats. Section 948.055(1), and two counts of Sex with a Child Age 16 or Older, a class A Misdemeanor, contrary to Wis. Stats. Section 948.09 in Chippewa County Circuit Court Case Number 2012CF000399. Interestingly enough, the State charged Clark with the three child sex offense charges on September 7, 2012, a month prior to the commencement on

October 8, 2012 of Wayerski's jury trial. The State was aware of the pending charges against Clark before Wayerski's trial commenced. (84:1- 5; 85:1-4; 86:1-6; 88: 1-24; 118: 215-231; 121: 6-22, 79-90, 87-89, 117-126,126-128; 122:18-43).

Wayerski's trial commenced October 8, 2012. Clark was called as a witness for the prosecution in Wayerski's case on October 11, 2012. Clark had ample reason to curry favor with the authorities. If Wayerski's counsel had been made aware of the pending charges brought by the State of Wisconsin in a neighboring county, then Wayerski would have been able to devastate Clark's credibility by demonstrating his actual bias and his incentive to lie in order to curry favor with the authorities. Because the defense was disarmed, Clark's credibility was not destroyed. And sadly, Wayerski's fate was sunk by a lying jail house snitch.. (84:1- 5; 85:1-4; 86:1-6; 88: 1-24;115: 118: 215-231; 121: 6-22, 79-90, 87-89, 117-126,126-128; 122:18-43).

The prosecution never disclosed the pending charges against Clark in Chippewa County Case Number 2012CF000399. The prosecution had a duty to disclose to the defense that Clark was facing prosecution for sexual offenses against children, and had ample reason to please the prosecution in Wayerski's case by falsely testifying so that he would look better by the time his own charges were resolved. Clark was not just any witness. Clark was

a jail house snitch who testified that Wayerski had confided in him and had confessed to committing the crimes charged and sought Clark's advice on how to game the system. . (84:1- 5; 85:1-4; 86:1-6; 88: 1-24; 118: 215-231; 121: 6-22, 79-90, 87-89, 117-126,126-128; 122:18-43).

The impeachment information about Clark's pending charges was clearly relevant. Bias means "the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." Bias may be induced by the witness' "like, dislike, or fear of a party, or by the witness's self-interest." Proof of bias is "almost always relevant" and extrinsic evidence of it is admissible. *U.S. v. Abel*, 469 U.S. 45, 51-52 (1984). The Confrontation Clause "requires a defendant to have some opportunity to show bias on the part of a prosecution witness" (citing *Davis v. Alaska* 415 U.S. 308, 316 (1974)) and, under the Rules of Evidence, bias falls under Fed. Rule Evid. 611(b) and Wis. Stats. Section 906.11. Exploration of possible biases, prejudices, or ulterior motives of the witness...is a particular means to attack the witness's credibility, and...is admissible. *Davis v. Alaska*, 415 U.S. 308, 316 (1974); *U.S. v. Turner*, 198 F.3d 425, 429 n. 2 (4th Cir. 1999). It was error to prevent the defendant from asking a snitch about "her perceived exposure to criminal liability and penalties" to her pending

criminal charges. *U.S. v. Turner*, 198 F.3d 425, 429-430 (4th Cir. 1999) (but error was harmless). "A witness's understanding of the potential penalties faced prior to entering into a plea agreement may demonstrate bias and prejudice, as well as motive of the witness for falsifying against the defendant and for the prosecution." *Id.* at 430.

When a witness' credibility is an important issue in the case, evidence of any understanding or agreements about a future prosecution would be relevant to his or her credibility, and the jury would be entitled to know it. *Giglio v. U.S.*, 405 U.S. 150, 154-155 (1972). The fact that one of the witness's "possible concern that he might be a suspect in [an] investigation" could have motivated him to falsely implicate the defendant. Such information was within the scope of fair cross-examination. *Davis v. Alaska*, 415 U.S. 308, 317-318 (1974). Witness's "vulnerable status as a probationer" could have provided a possible motive to assist the police and could have led to the witness's cooperation and testimony. *Davis v. Alaska*, 415 U.S. 308, 317-318 (1974).

Government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). The law requires the disclosure of exculpatory and impeachment evidence when such evidence is material to guilt or

punishment. *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 154. Because they are constitutional obligations, *Brady* and *Giglio* evidence must be disclosed regardless of whether the defendant makes a request for exculpatory or impeachment evidence. *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995).

Exculpatory and impeachment evidence is material to a finding of guilt—and thus the Constitution requires disclosure—when there is a reasonable probability that effective use of the evidence will result in an acquittal. *United States v. Bagley*, 475 U.S. 667, 676 (1985). Recognizing that it is sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence. *Kyles*, 514 U.S. at 439.

Clark appeared in court on September 18, 2012 for an initial appearance on his child sexual offense charges in Case Number 2012CF000399 in Chippewa County Circuit Court. Clark was definitely aware at the time of his testimony against Wayerski that he was facing prosecution for felony sex crimes against children. Again, the prosecution in Wayerski's case fails to make any disclosure to Wayerski's trial counsel of any of these matters. Trial counsel was not aware of any of this information regarding pending charges against John R. Clark. This impeachment information was not disclosed to him. It should have been disclosed to

him. The prosecution was under an obligation to disclose it to him. But the impeachment information was not disclosed to him. The prosecution was aware of this information about Clark. The prosecution gained a strategic advantage over Wayerski. The jury never learned that Clark had reason to curry favor with the prosecution because he had pending child sex charges and drug charges. The jury was unaware of how biased Clark actually was. The jury was misled into believing that Clark had no interest in the outcome. (84:1- 5; 85:1-4; 86:1-6; 88: 1-24; 118: 215-231; 121: 6-22, 79-90, 87-89, 117-126,126-128; 122:18-43).

The failure to disclose this information deprived Wayerski of a fair trial. Clark had more than ample reason to testify falsely against Wayerski. The jury was left with the false impression that Clark was a completely disinterested witness who was coming forward because the offense was reprehensible to him and he simply reported this out of some moral outrage because the offense involved "kids." Clark falsely claimed that he expected nothing in return. (118: 215-231). The jury that decided Wayerski's case never found out that Clark, the jail house snitch, was facing a felony sex offense charge involving children. They were never exposed to his hypocrisy. Clark was never subject to cross-examination on what type of sentence he expected, even if he didn't have a deal, at the time of sentencing on his own child sex offenses. Clark had major reasons to lie against Wayerski. Wayerski's

jury never learned this. The timely disclosure of this information could have led to the discovery of witnesses who could have been called at trial on surrebuttal to testify that Clark was not a trustworthy and truthful person because they were child victims of his sexual offenses. This failure on the part of the prosecution to disclose this information to the defense is reversible error.

The impeachment information concerning Clark's pending child sex offenses and other charges would have demonstrated that he was not neutral and disinterested. (118: 215-231; 88: 1-24; 118: 215-231; 121: 6-22, 79-90, 87-89, 117-126,126-128; 122:18-43; 123: 4-144). *United States v. Kohring*, 637 F.3d 895 (9th Cir. 2011) (reversing conviction where prosecution failed to disclose that key witness to alleged extortion and bribery scheme was under investigation for sexual exploitation of minors which shed light on his incentive to cooperate with law enforcement).

The State conceded that it was aware of the pending charges against Clark before calling him to testify. Clark was the only witness who testified as to a confession by Wayerski. A confession that Wayerski contends was completely fabricated and false. (84:1- 5; 85:1-4; 86:1-6; 88: 1-24;118: 215-231; 121: 6-22, 79-90, 87-89, 117-126,126-128; 122:18-43; 123: 4-143) Wayerski's trial counsel would have used the information pertaining to Clark's pending charges to impeach Clark for bias

and credibility if the State had disclosed the Brady information to him. (56:1-4;57: 1-17;121:6-126; 122: 1-83; 123: 4-143). Nevertheless the circuit court at the final post-conviction hearing was unpersuaded the failure to disclose the pending charges against Clark warranted granting Wayerski's motion for a new trial. (123:4-143; App.6: 1-104).

And the error here was by no means harmless. It is important to note that the prosecution called Clark at the very end of the case during rebuttal. Additionally the State stressed the value of Clark as a witness in its closing argument as well as the rebuttal closing argument. (118: 215-231; 119:46-47, 102-104). The circuit court's decision to deny Wayerski a new trial because of the *Brady* violation was clearly erroneous because Wayerski was prejudiced by the failure of the State to disclose the pending charges against Clark. Prejudice means that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The non-disclosure of *Brady* impeachment information in Wayerski's case was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. *See State v. Harris*, 2008 WI 15, ¶¶15, 41-42, 61, 307 Wis. 2d 555, 745 N.W.2d 397.

V. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT VERDICTS OF GUILTY FOR COUNTS 9-16 OF THE SECOND AMENDED INFORMATION.

Standard of Review:

The standard for reviewing the sufficiency of the evidence to support a conviction is the same in either a direct or circumstantial evidence case. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). In either case, an appellate court may not receive a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *Id*.

Further:

> The test is not whether this court or any of the members thereof are convinced [of the defendant's guilt] beyond reasonable doubt, but whether this court can conclude the trier facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true. . . .
>
> Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted . . .

Id. at 503-04 (quoted sources omitted; brackets in *Poellinger*). "It is the function of the trier of fact, and

not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from the basic facts to ultimate facts." *Id*. at 506.

Wis Stats. 948.095 is entitled Sexual Assault of a Child by a School Staff Person or a Person Who Works or Volunteers with Children. This law, in pertinent part, is set forth below:

> (3)
>
> (a) A person who has attained the age of 21 years and who engages in an occupation or participates in a volunteer position that requires him or her to work or interact directly with children may not have sexual contact or sexual intercourse with a child who has attained the age of 16 years, who is not the person's spouse, and with whom the person works or interacts through that occupation or volunteer position.
>
> (b) Whoever violates par. (a) is guilty of a Class H felony.
>
> (c) Paragraph (a) does not apply to an offense to which sub. (2) applies.
>
> (d) Evidence that a person engages in an occupation or participates in a volunteer position relating to any of the following is prima facie evidence that the occupation or position requires him or her to work or interact directly with children:
>
> 1. Teaching children.
> 2. Child care.
> 3. Youth Counseling
> 4. Youth organization.
> 5. Coaching children
> 6. Parks or playground recreation.
> 7. School bus driving.

Gary Wayerski was a police officer, not a teacher, day care center operator, youth pastor or juvenile probation officer. The evidence was insufficient to convict Wayerski of these charges. (28:1-5, 115: 2-235, 116: 2-271, 117: 2-212, 118: 2-246, 119: 3-130). Sergeant Travis Mayer of the Dunn County Sheriff's Office opined at trial that it is "not standard practice for a law enforcement officer at any level to directly supervise or be involved with an individual who's performing community service as part of a criminal or related matter." (116: 194-199).

The title of the statute in question, Wis. Stats. Section 948.095, Sexual Assault of a Child By A School Staff Person or A Person Who Works or Volunteers With Children, does not even mention the profession of police officer, police chief or law enforcement officer as coming within the ambit and scope of this law. A court may consider titles of statutes to resolve doubt as to statutory meaning. *In the Interest of C.D.M.* 125 Wis. 2d 170, 370 N.W.2d 287 (Ct. App. 1985). If the legislature intended this law to prohibit sexual assaults committed by police officers, police chiefs, and law enforcement officers, the law in its very title would have referenced this profession specifically. Nothing in the legislative history of the law indicates any legislative purpose to include law enforcement officers as within the class of professions or occupations which this law describes as defined perpetrators by virtue of their occupations or professions. See 1995 a. 456; 2001 a. 109; 2005 a. 274; 2007 a. 97; 2009 a. 302.

The most important case on statutory interpretation is *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, 271 Wis.2d 633, 681 N.W.2d 110. In *Kalal*, the court declared that the statutory text itself is the most important consideration because a court's role is to determine what a statute means rather than determine what the legislature intended. *Id.*, at ¶ 44.

> It is ... a solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature, and to do so requires a determination of statutory meaning. Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. We assume that the legislature's intent is expressed in the statutory language. Extrinsic evidence of legislative intent may become relevant to statutory interpretation in some circumstances, but is not the primary focus of inquiry. *It is the enacted law, not the unenacted intent, that is binding on the public*. Therefore, the purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.

Id. (emphasis added).

The court emphasized that statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *Id.*, at ¶ 45.

There was insufficient evidence to prove beyond a reasonable doubt the second element of the offense according to the pattern jury instruction

– whether Wayerski "(engaged in an occupation) (participated in volunteer position) that required (him) . . . to work or interact directly with children." Wis JI-CRIMINAL 2139A. (16; 28;115;116;117;118; 119: 3-28). The statute, Wis. Stats. 948.095 (3)(a), is inapplicable to child sexual assaults by police officers. Counts 9 through 16 were wrongly charged and Wayerski was wrongly convicted because the evidence was insufficient to sustain his conviction on these charges. Judgements of acquittal should be entered by this Court on counts 9 through 16.. (28:1-5, 115: 2-235, 116: 2-271, 117: 2-212, 118: 2- 246, 119: 3-130).

VI. A NEW TRIAL SHOULD BE GRANTED IN THE INTERESTS OF JUSTICE UNDER WIS. STATS., § 752.35.

Standard of Review:

A reversal under Wis. Stats. § 752.35 is reviewed under the erroneous exercise of discretion standard. *State v. Kucharski*, 2015 WI 64 __Wis. 2d__, __N.W.2d__,13-0557.

Under Wis Stats. § 752.35., appellate courts may fairly conclude that the real controversy has not been fully tried "when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case" or "[w]hen the jury had before it evidence not properly admitted which so clouded a crucial issue." *See* ***State***

v. Johnson, 149 Wis. 2d 418, 429, 439 N.W.2d 122 (1989) (citation omitted). A finding of a substantial probability of a different result on retrial is not required for a case to be reversed if the real controversy has not been fully tried. ***Id.*** Wayerski was denied his right to present **important testimony** denying all of Clark's false testimony; Clark should have been impeached with his pending sex charges. The jury should never heard the revolting pornography, photos and text messages which **clouded the crucial issues** in this case. This Court should not have confidence that the real controversy was fully tried. The record should convince this Court that a new trial is warranted in the interest of justice.

CONCLUSION

Gary L. Wayerski for the reasons discussed above requests a judgment of acquittal on Counts 9 through 16 and a new trial.

Dated at Milwaukee, Wisconsin, this 15th day of February, 2016.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,943 words.

Dated at Milwaukee, Wisconsin, this 15th day of February, 2016

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed served on today's date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated at Milwaukee, Wisconsin, this 15th Day of February, 2016.

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CERTIFICATION OF APPENDIX

I hereby certify that I have filed an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;
(2) the findings or opinions of the circuit court;
(3) a copy of any unpublished opinion cited under s. 809.23(3) (a) or (b);
(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated at Milwaukee, Wisconsin, this 15th Day of February, 2016.

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