STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2015AP1083-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY LEE WAYERSKI,

Defendant-Appellant.

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

PLAINTIFF-RESPONDENT'S BRIEF

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes that oral argument is unnecessary as the parties have fully developed the arguments in their briefs. Publication is warranted so that this Court can provide guidance in interpreting Wis. Stat. § 948.095(3), which prohibits sexual assault by a person who works with or volunteers with children.

SUPPLEMENTAL STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The State will supplement Wayerski's statement of the case and statement of the facts as appropriate in its argument.

SUMMARY OF ARGUMENT

Two juveniles, JDP and JMH, knew Gary Wayerski in his capacity as the police chief for a Dunn County village. They alleged that Wayerski committed several acts against them that constitute crimes under Wis. Stat. ch. 948 (1). Following a five day trial, a jury found Wayerski guilty of

- child enticement, contrary to Wis. Stat. § 948.07(3) (two counts);
- exposing genitals or pubic area, contrary to Wis. Stat. § 948.10(1)(a) (two counts);
- exposing a child to harmful materials, contrary to Wis. Stat. § 948.11(2)(a) (two counts);
- causing a child older than 13 to view/listen to sexual activity, contrary to Wis. Stat. § 948.055(1) & (2)(b) (two counts); and

- sexual assault of a child by a person who works or volunteers with children, contrary to Wis. Stat. § 948.095(3)(a) (seven counts).

(119:123-26).

Wayerski moved for postconviction relief (57). Following an evidentiary hearing (121; 122) and the parties' briefs (86; 88), the circuit court denied Wayerski's motion (94; 123).

Wayerski raises six issues on appeal. First, Wayerski contends that trial counsel was ineffective for failing to provide him with the opportunity to deny that he made incriminating statements to a State's witness. Because Wayerski previously denied the allegations and trial counsel presented a defense grounded in his claims of innocence, trial counsel's performance was not ineffective. Wayerski also asserted that trial counsel should have moved for a mistrial based on the admission of certain evidence of a sexually oriented nature. But trial counsel was not ineffective because he repeatedly objected to the admission of this evidence.

Second, Wayerski asserts that the circuit court should have granted his motion to change the trial venue. The circuit court properly denied the motion and impaneled a fair and impartial jury.

Third, Wayerski contends that the circuit court erred when it admitted evidence of a sexually oriented nature that was highly inflammatory. The circuit court properly exercised its discretion when it admitted this evidence because the evidence showed Wayerski's interest in people of the same gender and the age range of the victims. It also revealed interests consistent with the type of sexually motivated conduct Wayerski directed at the victims. The evidence was admitted for a proper purpose, was logically relevant, and not unduly prejudicial.

Fourth, Wayerski argues that the prosecutor failed to disclose exculpatory impeachment evidence about a witness' pending case in another county. The information was not in the State's exclusive possession as the prosecutor acquired this information through a search of readily accessible public records (CCAP). Even if the State should have disclosed this information, the circuit court properly found that the evidence of Wayerski's guilt was substantial (123:139). There was no reasonable probability that disclosure of the information would have resulted in a "not guilty" verdict.

Fifth, Wayerski asserts that the evidence was insufficient to convict him of the offense of sexual assault by one who works with children. Because Wayerski's relationship with the victims developed through his employment as a law enforcement officer, the State presented sufficient evidence to convict him of this offense.

Sixth, Wayerski also believes he is entitled to a new trial in the interest of justice. He has failed to demonstrate why this Court should exercise its discretion and grant him relief.

ARGUMENT

I. Trial counsel did not render ineffective assistance.

Wayerski argues that trial counsel was ineffective on two grounds. First, he contends that trial counsel was deficient for failing to question him about John Clark's prior testimony that Wayerski admitted his conduct to him. Wayerski's Br. 19-22. Second, Wayerski asserts that trial counsel was deficient for failing to move for a mistrial after the introduction of sexually oriented photographs and texts. Wayerski's Br. 22.

The circuit court rejected Wayerski's claims (123:59-61). The record demonstrates that the circuit court's findings were not clearly erroneous. Trial counsel's performance was not deficient and did not prejudice Wayerski's defense.

A. General legal principles guiding review of claims of ineffective assistance of counsel.

The United States Constitution's Sixth Amendment right of counsel and its counterpart under article I, § 7 of the Wisconsin Constitution encompass a criminal defendant's right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984); *State v. Sanchez*, 201 Wis. 2d 219, 226-36, 548 N.W.2d 69 (1996). A defendant alleging ineffective assistance of trial counsel must prove that trial counsel's performance was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland*, 466 U.S. at 687.

To prove deficient performance, the defendant must show that his counsel's representation "fell below an objective standard of reasonableness" considering all of the circumstances. *Id.* at 688. The defendant must demonstrate that specific acts or omissions of counsel fell "outside the wide range of professionally competent assistance." *Id.* at 690. In assessing the reasonableness of counsel's performance, a reviewing court should be "highly deferential," making "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689.

To demonstrate prejudice, the defendant must affirmatively prove that the alleged deficient performance prejudiced his defense. *Id.* at 693. Rather, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; a defendant must show that trial counsel's errors were so

serious that the defendant was deprived of a fair trial and reliable outcome. *Id.* at 687.

Standard of review. A claim of ineffective assistance of counsel is a mixed question of law and fact. *State v. Carter*, 2010 WI 40, ¶ 19, 324 Wis. 2d 640, 782 N.W.2d. While this Court must uphold the circuit court's findings of fact unless clearly erroneous, the ultimate determination of whether counsel's assistance was ineffective presents a legal question which this Court reviews de novo. *Id.*

B. Trial counsel was not deficient for failing to move for a mistrial after the State introduced evidence of sexually oriented photographs and texts.

Before trial, the State moved to introduce other acts evidence that included pornographic images that closely comported with the victims' anticipated testimony (6:2; 33). In three separate pleadings, Wayerski moved in limine to exclude this evidence (11:2; 12:1-2; 19). Before trial, the circuit court agreed to admit this evidence but placed limits on the amount it would allow the State to introduce (111:12-13, 15; 114:14-18). Before the State introduced photographs at trial, the circuit court reviewed them in light of the testimony and admitted them (117:101-17). It noted trial counsel's continuing objection to the admission of any of the photographs (117:116).

The circuit court correctly found that trial counsel's performance was not deficient (123:59-61). Counsel timely objected to the admission of the sexually oriented evidence both before and during trial, preserving the issue for appellate review. In light of the circuit court's decision to admit the photographs, a motion for a mistrial would have been futile (123:61). *See State v. Berggren*, 2009 WI App 82, ¶ 21, 320 Wis. 2d 209, 769 N.W.2d 110 (performance not deficient for failing to bring motion that would have been denied).

C. Failure to ask Wayerski on surrebuttal whether he made statements that witness Clark testified about on rebuttal was not ineffective.

The State called John Clark as a rebuttal witness. Clark's testimony related to Wayerski's statements to him while they were in the Chippewa County jail (118:215-26). Wayerski testified on surrebuttal (118:233-34). He now claims that his trial counsel was ineffective for failing to ask him whether he actually made incriminating statements to Clark. Wayerski's Br. 19-22.

Following the postconviction motion, the circuit court concluded that trial counsel's performance was not deficient. Trial counsel "was not overall so deficient as to have not provided . . . constitutionally sound representation" (123:83-84). "[H]e absolutely addressed the major issues in this case and provided the representation that he was required to provide" (123:84). The record supports the circuit court's findings.

Wayerski's claim focuses on trial counsel's failure to ask Wayerski if he confessed to Clark. Trial counsel could not explain why he failed to ask Wayerski this question. (121:108). But trial counsel observed, "[T]his is the benefit of 20/20 hindsight" (121:109). *See Strickland,* 466 U.S. at 689 (cautioning courts "to eliminate the distorting effects of hindsight" and "to evaluate the conduct from counsel's perspective at the time"). But at the postconviction hearing, trial counsel also testified that Wayerski asked trial counsel to question Wayerski about the number of people who had been incarcerated with him in the county jail (121:109). Trial counsel did precisely what Wayerski asked by questioning him about the number of people Wayerski was in jail with and whether they had access to the media (118:234). This bolstered trial counsel's attack during cross-examination and in closing argument that Clark's knowledge of Wayerski's offenses came from media access, rather than from

Wayerski's disclosure of information to Clark (118:228; 119:79-80).[1]

Trial counsel's failure to ask Wayerski whether he confessed to Clark also did not undermine Wayerski's defense: JDP and JMH made up the allegations to destroy him. Trial counsel made this point in both opening and closing statements (115:230-31; 119:76-79). The defense suggested that the allegations coincided with Wayerski's drug investigation (119:88-89).

Trial counsel presented four witnesses who supported Wayerski's defense. Kendra Berg asked JDP about what was going on with Wayerski. JDP replied that none of it was true and that he wished it had never happened (117:205-06). JDP told Kay Detmar that JDP and JMH were drinking and looking at pornography on Wayerski's computer and Wayerski was mad at them. JDP then told Detmar that he crossed the line and that what he said to the cops was a lie (118:13-15). Detmar also claimed that JDP told her that Wayerski was "going down" because Wayerski was putting a stop to the drug abuse in Wheeler (118:29). Tiffany Mullan testified that JDP told her that JDP and JMH were going to do something funny and it involved Wayerski (118:34-35). JDP later told her that the incident involving JMH and JDP was not true and that it was a lie (118:34). Allen Mayer stated that he heard them say that they had "set [Wayerski] up. We got him" (118:46). Later, Mayer said JDP definitely made these statements. The suggestion was that Wayerski was "too nosey" as it related to drug activity (118:47). Wayerski testified that he developed information about several individuals dealing drugs in Wheeler who were all connected to JDP and JMH (118:113-14).

[1] Wayerski's conduct during trial also made it difficult for trial counsel to perform his duties. Wayerski had the "annoying" habit of talking into trial counsel's ear while trial counsel attempted to listen to or ask witnesses questions (121:109).

Before Clark's testimony, Wayerski unequivocally denied touching either JDP or JMH in a sexually inappropriate manner or performing oral sex on them (118:106, 108, 144). Wayerski also denied spanking them, showing them pornography, or providing them with alcohol (118:105-07).

Trial counsel's failure to ask Wayerski whether he admitted his conduct to Clark was neither deficient nor prejudicial. At trial, the jury heard significant evidence apart from Clark's testimony that supported the guilty verdicts. This included the testimony from the two victims, JDP and JMH, and evidence from officers regarding the seizure of evidence seized from Wayerski's computer and phone described in Sections III.B. & C., below.[2]

Wayerski told the jury that he did not commit the crimes and trial counsel presented a defense consistent with Wayerski's innocence. When viewed against the context of the entire trial, Wayerski has not demonstrated that his trial counsel's failure to ask him the question about Clark created a substantial likelihood of a different result such that he was deprived of a fair trial and reliable outcome.

II. The circuit court properly exercised its discretion when it denied Wayerski's motion for a change of venue.

Wayerski contends that the circuit court erred when it denied his motion for a change of venue. Wayerski's Br. 23-25. A review of the record demonstrates that the circuit court properly exercised its discretion when it denied the motion.

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[2] In support of the argument that trial counsel's performance did not prejudice Wayerski's defense, the State also relies on its argument in section III.C., below that any error in the admission of certain evidence was harmless.

A. General legal principles governing a motion for a change of venue.

Under Wis. Stat. § 971.22(1), a "defendant may move for a change of the place of trial on the ground that an impartial trial cannot be had in the county." To obtain a change of venue, the requesting party must present sufficient evidence to show there is a reasonable likelihood of community prejudice so pervasive as to preclude the possibility of a fair trial in that community. *State v. Albrecht,* 184 Wis. 2d 287, 306, 516 N.W.2d 776 (Ct. App. 1994).

To determine whether the defendant presented evidence sufficient to meet this standard, the court considers 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. (citations omitted).

Pretrial publicity alone does not establish prejudice. The question is whether articles were "calculated to form public opinion against the defendant." *Turner v. State*, 76 Wis. 2d 1, 27, 250 N.W.2d 706 (1977). Articles that discuss a case's facts are merely informational and not inflammatory. *Id*. "An informed jury is not necessarily a prejudicial one." *Id*. at 28 (citation omitted).

Standard of review. An appellate court reviews a circuit court's denial of a change of venue motion under the erroneous exercise of discretion standard. *State v. Fonte*, 2005 WI 77, ¶ 12, 281 Wis. 2d 654, 698 N.W.2d 594. However, the appellate court "independently evaluate[s] the

circumstances to determine whether there was a reasonable likelihood of community prejudice prior to, and at the time of, trial and whether the procedures for drawing the jury evidenced any prejudice on the part of the prospective or empanelled jurors." *Id*. (internal quotation marks and citations omitted).

B. The circuit court appropriately exercised its discretion when it denied Wayerski's motion for a change of venue.

The circuit court appropriately denied Wayerski's motion for a change of venue.

While Wayerski's case received publicity, it was not inflammatory. An affidavit that included various attachments from Internet sources accompanied Wayerski's motion for a change of venue (10:1-23). For the most part, the attachments reference Internet search engine searches and articles related to Wayerski's arrest and charging (10:5-6, 8-19), and articles about Wayerski's consideration of an insanity defense (10:20), additional evidence against Wayerski (10:21, 23), and the village board's investigation and suspension of Wayerski (10:22).

The articles contained factual information concerning the charges and the proceedings. Wayerski has not alleged that the articles contained the type of inflammatory statements from members of the public or government officials that would undermine Wayerski's right to a fair trial.

The affidavit incorporated a guest editorial entitled "True Heroes: Victims who Report Sexual Assault Protect Us All" (10:3). The article referenced a recent arrest of a "local law enforcement official," but did not identify Wayerski by name or the community where the incident occurred (10:3).

The affidavit included a Facebook page for a group, "War Against Child Abuse." The included page references Wayerski and includes posts by others about him (10:7). While these comments may be troubling, nothing suggests that the people who commented on the posts were from Dunn County.

At the hearing, the circuit court noted the media coverage but concluded that it could find a fair and impartial jury to hear the case (105:12). It recognized that the nature of the charges and Wayerski's position presented concerns, but those concerns would be present wherever the case was tried (105:13, 15).

To facilitate selection of a fair and impartial jury, the circuit court undertook additional efforts that included summoning a larger jury panel and allowing more extensive voir dire (105:13). During jury selection, the circuit court conducted individualized voir dire of the panel members who had familiarity with the case or witnesses whose names were mentioned (115:29-174).

In support of his claim, Wayerski contends that twenty jurors had heard about the case. Some were excused for cause because they could not be impartial. Ultimately, at least three jurors familiar with the media accounts were selected to decide the case. Wayerski's Br. 25. In fact, Wayerski's argument supports the judge's decision not to change the venue. Wayerski offered no evidence that the three empanelled jurors familiar with the case were biased against him. Through a careful process, the circuit court weeded out jurors who may have been unfairly biased against Wayerski. The circuit court's procedures protected his right to a fair trial. It appropriately exercised its discretion when it denied Wayerski's motion for a venue change.

III. The circuit court did not erroneously exercise its discretion when it admitted evidence of a sexually oriented nature.

At trial and on appeal, Wayerski complains about the admission of evidence of a sexually oriented nature. This evidence included: (a) a Charter bill that identified Wayerski as the account holder and reflected the purchase of pay-per-view adult themed movies; (b) nine photographs that depicted nude males including being spanked and in a jail-type setting; (c) chat logs that included the defendant's chat moniker and included chats with a bondage theme; and (d) photographs on a cellular phone linking Wayerski to it, including a picture of his exposed penis. Wayerski's Br. 26-33.

Trial counsel objected to the admission of this evidence. *See* Section I.B., above. The circuit court properly admitted this evidence. Before it admitted the photographic evidence, it reviewed them in light of the victims' testimony. The circuit court identified nine photographs to be admitted that depicted "at least to some degree what they say occurred to them" (117:111). It also admitted black-and-white photographs of general poses that are relevant to the victims' testimony and are admissible for a permissible purpose including motive and intent (117:112). As the State will demonstrate, the record supports the circuit court's exercise of discretion to admit this evidence.

A. General legal principles governing the admissibility of evidence including other act evidence.

Standard of review. The decision to admit or exclude evidence rests within the circuit court's discretion. *State v. Warbelton*, 2009 WI 6, ¶ 17, 315 Wis. 2d 253, 759 N.W.2d 557. An appellate court will only reverse a decision to admit or exclude evidence when the circuit court has erroneously exercised its discretion. *Id.* An appellate court will not find an erroneous exercise of discretion if the record contains a

reasonable basis for the circuit court's ruling. *State v. Hammer*, 2000 WI 92, ¶ 21, 236 Wis. 2d 686, 613 N.W.2d 629.

Admissibility of other act evidence. Wisconsin Stat. § 904.04(2)(a) permits the introduction of other act evidence. Courts apply a three-step analysis to determine the admissibility of "other acts." *State v. Sullivan*, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998).

First, the evidence must be offered for an admissible purpose under § 904.04(2)(a), such as to establish motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, although this list is not exhaustive or exclusive. *Sullivan*, 216 Wis. 2d at 772. Courts have also admitted other act evidence to show the context of the crime, to provide a complete explanation of the case, and to establish the credibility of victims and witnesses. *State v. Hunt*, 2003 WI 81, ¶¶ 58, 59, 263 Wis. 2d 1, 666 N.W.2d 771.

Second, the evidence must be relevant, which means it must both be of consequence to the determination of the action, and must also have a tendency to make a consequential fact or proposition more probable or less probable than it would be without the evidence. *Sullivan*, 216 Wis. 2d at 772; *see also* Wis. Stat. § 904.01. "To be relevant, evidence does not have to determine a fact at issue conclusively; the evidence needs only to make the fact more probable than it would be without the evidence." *State v. Hartman*, 145 Wis. 2d 1, 14, 426 N.W.2d 320 (1988). The proponent of the other act evidence carries the burden of establishing its relevance. *Hunt*, 263 Wis. 2d 1, ¶ 53.

Third, the probative value of the other act evidence must not be substantially outweighed by the considerations set forth in Wis. Stat. § 904.03, including the danger of unfair prejudice, confusion of the issues or misleading the jury, or undue delay, waste of time or needless presentation of cumulative evidence. *Sullivan*, 216 Wis. 2d at 772-73. The opponent of the other act evidence must demonstrate that

any unfair prejudice that would flow from the admission of the other act evidence substantially outweighs its probative value. *Hunt*, 263 Wis. 2d 1, ¶ 53.

Evidence that relates directly to an element of the crime or that directly supports a theory of defense is not other act evidence. *See State v. Johnson*, 184 Wis. 2d 324, 349, 516 N.W.2d 463 (Ct. App. 1994) (Anderson, J., concurring). Likewise,"[e]vidence is not 'other acts' evidence if it is part of the panorama of evidence needed to completely describe the crime that occurred and is thereby inextricably intertwined with the crime." *State v. Dukes*, 2007 WI App 175, ¶ 28, 303 Wis. 2d 208, 736 N.W.2d 515.

B. The circuit court properly exercised its discretion when it admitted evidence of a sexually oriented nature.

The circuit court properly admitted the sexually oriented evidence at Wayerski's trial. As the State will demonstrate below, this evidence was logically relevant because it related directly to Wayerski's crimes. The evidence constituted proof of the charged offenses, including exposing a child to harmful material, and forced viewing of sexual activity (34:2). The evidence was also interwoven with Wayerski's sexual assaults against JDP and JMH. Wayerski would masturbate them while he viewed pornography with them. Other evidence recovered from Wayerski's property demonstrated an interest in males in their late teens, similar to the victims' ages, and fetish behavior such as spanking that he directed toward the victims.

1. Record of relevant facts related to Wayerski's claim.

Sexually oriented evidence offered at trial. Jeff Nocci, an Eau Claire County Sheriff's Deputy, examined a computer seized from Wayerski. He observed pornography in the form of photographs and videos. Much of the evidence involved "male/male" activities that included bondage and

spanking. He described a majority of the subjects depicted in the material as males between 16 and 20 years old (117:95-96). Nocci described how the material was organized under the user name "Gary." Picture folders contained subfolders that included a number of sexually oriented titles including "milking," "punish," "spanking," and "stances" (117:100). The images contained in the picture folder had a date range from May 30, 2011, through July 16, 2011 (117:126).

While denying showing either victim pornography or engaging in sexual conversations with them (118:183), Wayerski acknowledged the possibility that he organized his computer folders with themes including "punish," "milking," and "spanking" (118:177). He also did not dispute the fact that the admitted photographs were recovered from his computer and that he may have had an interest in the types of material recovered from his computer (118:180-82). Wayerski also admitted an interest in a website entitled "teens-boys world" (118:182-83).

Nocci also recovered instant messenger chat logs tied to an email address dairymilkfarmer123@yahoo.com (117:132). Wayerski confirmed this user name (118:187). Nocci testified that the chat logs included discussions of several sexually oriented themes including degradation and punishment (117:135-38). This email address was linked to a phone number listed to Wayerski (117:139). Wayerski confirmed this user name and did not dispute conversations under this user name (118:187). A list of websites under "Gary['s]" favorites included themes such as "young guy, slave boys, torture, leather, bondage, spanking" (117:151).

Wayerski's grooming and first sexual contacts with JDP and JMH. Wayerski groomed both JDP and JMH. Wayerski's interest in both boys started after he investigated them for separate property crimes. JDP had broken into his church's safe (116:10-11). JDP's parents asked Wayerski to spend time with JDP who had become involved with drugs, and Wayerski agreed (116:82, 91). JMH stole property from another person (116:130-31). Wayerski

assumed responsibility for supervising JMH's community service (118:131-33). This supervision included inviting JDP and JMH on ride-alongs (116:13, 19, 134). Wayerski discussed sex with JDP on the ride-alongs (116:65, 83).

Wayerski's first sexual contact with JDP and JMH occurred during their separate visits to his apartment. In both cases, Wayerski initiated the contact under the guise of improving their physical fitness.

During JDP's first visit to Wayerski's apartment, Wayerski directed JDP to take off his shirt and pants so that Wayerski could see JDP's muscle tone and determine where to start workouts. Wayerski hit JDP in the chest and told him how solid JDP was and that he liked pounding on him (116:21-22). Wayerski also had JDP squat in front of him with his arms around Wayerski's neck. Wayerski would slap JDP in the face and then "ball tap" him (116:24). Wayerski would slap JDP's testicles to get his "endorphins moving" and enhance his workout (116:24-25). Wayerski would then proceed to masturbate him (116:26).

During JMH's first or second visit to Wayerski's apartment, Wayerski offered to help JMH with physical training (116:137, 139). Wayerski asked JMH to take off his shirt and pants so that he could check his muscle tone and see what needed improvement (116:138). Wayerski then massaged JMH's body, including his butt and penis. Wayerski explained to JMH that he was attempting to build up JMH's endorphins or testosterone (116:140). Eventually, Wayerski masturbated JMH (116:41).

Pornography viewing at Wayerski's apartment. At trial, both JDP and JMH testified that they viewed pornography with Wayerski at his apartment. JDP stated that Wayerski and he discussed pornography while JDP drove on ride-alongs with Wayerski (116:14, 32). JDP noted that Wayerski was into bondage pornography and fetishes. They would also watch videos that showed intimate body parts and sex acts (116:33-34). The pornography that they

watched was either over the computer or through Charter cable television (116:55). Wayerski would access the pornography that JDP watched on television (116:54). Wayerski was always present when they used his computer to watch pornography (116:50). While watching the pornography, Wayerski would masturbate JDP (116:35). Wayerski began masturbating JDP during the second visit to the apartment (116:69). This happened more than twenty times from March through July of 2011 (116:37). JDP denied interest in same sex pornography (116:51).

JMH also reported being at Wayerski's apartment fifteen-to-twenty times. While there, Wayerski would show him pornography, either online or through his cable provider, Charter (116:152). Wayerski would set up the pornography videos for him to watch through a website, "pornhub" (116:155). When JMH watched "on demand" adult pornography on Charter, Wayerski would allow JMH to select the movie with the remote control (116:162). JMH recalled Wayerski becoming furious with the boys after receiving a Charter bill, "because of all the videos he would order and allow us to . . . watch " (116:172).

Wayerski was in the room with JMH when they viewed pornography (116:153). The pornography included unclothed persons engaged in sex acts in which penises, vaginas, breasts, and buttocks were visible (116:154, 163). Wayerski would direct JMH to disrobe and would rub JMH's body and masturbate JMH while the videos played (116:156). JMH's interactions at the apartment included alcohol, pornography, and Wayerski touching him in various ways (116:161). JMH denied using the computer by himself (116:163).

The night before JDP and JMH reported Wayerski's conduct, both were present at Wayerski's apartment. Wayerski stripped them down. Wayerski sat between JDP and JMH, turned on pornography, and proceeded to masturbate them both (116:49, 159-60).

Sexually oriented evidence depicting interests consistent with Wayerski's sexual assaults. Consistent with Wayerski's interest in punishment, and degradation, two photographs recovered from Wayerski's computer depicted an officer standing behind four males with their buttocks exposed, facing a wall, with their legs spread. In one photograph, the males had their arms extended and hands on jail bars in front of them (97:Exs. 27; 28; 117:122-23). Exhibit 27 was located in a subfolder labeled "punish," while Exhibit 28 was found in a folder labeled "degrading" (117:128). JDP testified that on one occasion, after Wayerski "ball tapped" him, Wayerski directed him against the wall, told him to spread his legs and place his hands on the wall and spanked him (116:41, 73).

Several photographs depicted nude males bent over with exposed buttocks being spanked by another person (97:Exs. 29; 30; 32). Another photograph recovered in a "spanking" subdirectory depicted a beaten buttock with a penis next to it (97:Ex. 31; 117:125). JDP stated that he was with Wayerski in a semi. Wayerski took JDP to the back of the semi, stripped him down, laid him across his lap, spanked him, and then masturbated him (116:40). Wayerski also spanked JDP in the apartment (116:73). JMH recalled Wayerski bending JMH over a chair or Wayerski's knee and "beat[ing] his ass with a spoon" (116:148-49).

Consistent with a subfolder entitled "milking" found in Wayerski's computer and Wayerski's instant messaging moniker "dairymilkfarmer123@yahoo.com" (117:100, 132), JMH also testified to an act that Wayerski characterized as "milking [JMH] out" (116:150). JMH got on to a table on all fours in the doggy position, naked. Wayerski placed Vaseline on his hand and masturbated him. Wayerski would tell JMH that he was a fine looking young stud or buck and call JMH "his bull boy" (116:150-51).

The circuit court admitted photographs of young males in posed positions (117:131; Ex. 97:33-35). JDP also identified a photograph of himself, shirtless, after he spent a

night at Wayerski's apartment, holding a cup that would typically contain alcohol (116:57; 97:Ex. 2). The photograph of JDP, along with others that included pictures of Wayerski, were recovered from a cellular telephone associated with Wayerski (117:177-79). Wayerski authenticated these photographs as well (118:192).

2. Legal basis for admitting the sexually oriented evidence.

As the State will demonstrate, this sexually oriented evidence was admissible to show Wayerski's intent and motive to commit the charged offenses.

The greater latitude rule: pornography and child victims. In cases involving sexual crimes against children, other act evidence enjoys "greater latitude of proof" for its admission. *See State v. Davidson*, 2000 WI 91, ¶ 36, 236 Wis. 2d 537, 613 N.W.2d 606 (internal quotation marks and citations omitted); *see also* Wis. Stat. § 904.04(2)(b). Courts may also admit other acts evidence under the greater latitude rule to corroborate a child victim's testimony against credibility challenges. *Davidson*, 236 Wis. 2d 537, ¶¶ 40, 66. In *State v. Normington*, 2008 WI App 8, ¶ 19, 306 Wis. 2d 727, 744 N.W.2d 867, this Court extended the "greater latitude" rule to include the admission of pornography in a prosecution for sexual assault of a child. Pornography depicting the insertion of objects into an anus demonstrated the defendant's sexually motivated interest in inserting an object into the victim's anus. *Id.* ¶ 30. This Court also admitted this evidence in part because the State was required to demonstrate that the sexual assault included an element of contact done with the intent to become sexually aroused or gratified. *Id*.

Child enticement and sexual assault of a child by one who works with children. The sexually oriented evidence was admissible under a *Sullivan* analysis. First, it was admissible for proper purposes, including intent and motive. The evidence revealed Wayerski's strong sexual interest in

teenage boys, similar in age to JDP and JMH. Further, this evidence also revealed that Wayerski had a strong interest in the type of sexual activity that he directed at both victims, including spanking, degradation by people in authority, punishment, and milking. This evidence corroborates their claims that Wayerski spanked and punished them and "milked" JMH for purposes of sexual gratification or degradation.

Second, this evidence was logically relevant. That Wayerski has these sexual interests has a tendency to make the facts more likely than it would be without the evidence. This evidence demonstrates that Wayerski spanked, degraded, and milked JDP and JMH for purposes of sexual arousal and degradation, an element in establishing that Wayerski's sexual contact was for those purposes (119:22). With respect to child enticement, it is also probative of the reason why Wayerski caused these juveniles to enter his apartment, a private place. Wis. Stat. § 948.07.

Third, the probative value of the sexually oriented evidence outweighed any danger of unfair prejudice. In *Normington*, this Court observed that a sexual interest in pornography is less disturbing than the actual assault that is on trial itself. 306 Wis. 2d 727, ¶ 35 ("[I]t is unlikely that the jury would punish Normington for the pornography rather than for the conduct he was charged with.").

Exposing a child to harmful materials and forced viewing of sexual activity. The evidence seized from Wayerski's computer was directly relevant to the elements of two different charged offenses: two counts of exposing a child to harmful material under Wis. Stat. § 948.11(2)(a), and two counts of forced viewing of sexual activity under Wis. Stat. § 948.055 (28). As noted above, Wayerski showed JDP and JMH pornography while they visited him at his apartment. Both reported watching pornography of nude persons with exposed private parts engaging in sexual acts.

The State offered no evidence that either JDP or JMH accessed the specific photographs or videos on the computer or noted on the Charter bill. Wayerski's Br. 28-29. But asking the children to review the evidence found in the computer to identify the specific images or videos that they watched with Wayerski would have re-exposed the children to the same harm that these statutes are intended to protect children from in the first place.

Under the circumstances, this evidence was properly admissible under *Sullivan*. First, it was admissible for several proper purposes, including intent and motive. Wayerski's strong interest in collecting pornography supports JDP's and JMH's claims that Wayerski accessed pornography, including harmful material and sexual activity, for them to view, both over the computer and television. Second, it was logically relevant. That is, the existence of pornography on Wayerski's computer and pay-per-view television make it more likely that JDP and JMH were actually exposed to harmful material and forced to view sexual activity while at Wayerski's apartment. Third, the probative value of the evidence outweighed any risk of unfair prejudice. *Sullivan*, 216 Wis. 2d at 772.

Lack of a cautionary instruction. Neither party requested the circuit court provide a cautionary instruction (118:243-44). But a failure to provide a cautionary instruction is not fatal. In *Normington*, this Court observed that while no instruction was given, the prosecutor did not improperly argue the other act evidence. 306 Wis. 2d 727, ¶ 37. Here, the State repeatedly emphasized that Wayerski's interests by themselves were not illegal (119:40, 42, 45). It discussed Wayerski's sexual interest in spanking and degrading conduct only after it described similar conduct that Wayerski directed toward each victim (119:37-38, 40). The State emphasized this evidence also revealed Wayerski's sexual interest and attraction to older teenagers (119:41). Under the circumstances, the failure to give the cautionary instruction did not prejudice Wayerski.

For the above reasons, the circuit court properly admitted the sexually oriented evidence revealing Wayerski's interest in teenage boys similar to the victims' ages and fetish interests to the conduct that Wayerski displayed toward the victims. It was admitted for a proper purpose, it was logically relevant, and it was not unduly prejudicial.

C. To the extent that the admission of this evidence was error, it was harmless.

The admission of inadmissible evidence is subject to the harmless error rule, under which the reviewing court will reverse only if there is a reasonable possibility that the error contributed to the conviction. *See State v. Dyess*, 124 Wis. 2d 525, 542-43, 370 N.W.2d 222 (1985). "An error is harmless if there is no reasonable possibility that the error affected the outcome of the trial." *State v. Koller*, 2001 WI App 253, ¶ 62, 248 Wis. 2d 259, 635 N.W.2d 838 (citation omitted).

For the same reasons the State asserts that trial counsel's performance did not prejudice Wayerski's defense, the State asserts that any error in the admission of the sexually oriented evidence was harmless. This includes JDP's and JMH's detailed accounts of Wayerski's initial contacts with them through his police contacts. *See* discussion at Section V.D., below. Through these contacts, Wayerski groomed JDP and JMH, initiating his first sexual contacts with them under the guise of being interested in their physical fitness. Wayerski frequently watched pornography with JDP and JMH. *See* discussion at Section III.B.1., above. JDP's mother and JMH's father both described how Wayerski's relationship with the family and JDP and JMH developed. Their testimony corroborated JDP's and JMH's frequent contacts with Wayerski and their overnight stays at his residence (116:93-96, 110-14). JMH's father also testified about the day that he picked JMH and JDP up after they left Wayerski's house. They called JMH's father because "some weird stuff had been happening for a

while" and that Wayerski had been molesting them (116:119). The father observed that they had been drinking (116:120), which was consistent with JDP's and JMH's statements and testimony that Wayerski had plied them with alcohol (116:49, 73, 120, 185-86).

JDP also testified that Wayerski had directed him to masturbate on to a plate (116:46-48). Officers recovered the plate from Wayerski's apartment, along with Vaseline and dog leashes (116:211-12, 224). DNA extracted from the plate belonged to JDP (117:81-82).

Detective Scott Kuehn, who had extensive experience investigating sexual assault cases (116:203), interviewed both JDP and JMH. Kuehn observed that both had demeanors that were consistent with other victims of sexual assault cases that Kuehn had investigated (116:205-08).

After officers executed the search warrant at Wayerski's apartment, Kuehn spoke with Wayerski by telephone. Kuehn did not tell Wayerski what he was investigating (116:228). Wayerski volunteered that officers would find "really kinky stuff" on his computer, including bondage, sadomasochism ("S and M"), spanking, and "homosexual stuff" (116:228-29). Wayerski stated that a former roommate, Zach, placed it there (116:229). During this conversation, Wayerski stated that he was contemplating suicide (116:231-32). Wayerski told Kuehn that he knew that JDP and JMH consumed alcohol and did nothing to stop them (116:233). But at trial, Wayerski said that he did not know about JDP and JMH's alcohol usage and pornography watching at his residence (118:166-67, 169-70).

Zach testified that he stayed at Wayerski's apartment. He contradicted Wayerski's assertion that he had viewed pornography on the computer or had been thrown out of the apartment for viewing "kiddy" pornography (117:47). Zach

stated that on one or two occasions, he met a younger male with the name of "J" at Wayerski's apartment.[3] On one occasion, he saw the person known to him as "J" sitting on a couch without a shirt while Wayerski was present and clothed (117:43:44).

Any error here in admitting this evidence was harmless. Both JDP and JMH relayed similar, compelling stories about how their initial contacts with Wayerski through their misdeeds culminated in his sexual offenses against them. Considerable physical evidence and testimony from citizens and law enforcement corroborated their testimony. The jury had the opportunity to fully consider and reject Wayerski's defense that JDP and JMH set him up. *See* Section I.C., above. This Court should not reverse Wayerski's convictions because there is no reasonable possibility that any errors in admitting this evidence contributed to his conviction.

IV. Even if the prosecutor failed to disclose a witness' pending charges to Wayerski, the nondisclosure does not undermine confidence in the verdict.

A. General principles regarding a prosecutor's obligations under *Brady v. Maryland,* and standard of review.

A prosecutor's suppression of evidence favorable to an accused violates due process when the evidence is material to guilt or to punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). *Brady* also encompasses impeachment evidence. *Giglio v. United States*, 405 U.S. 150, 154 (1972).

To establish "a *Brady* violation," a defendant must show that: (1) the evidence was favorable to the accused as either

[3] JDP and JMH have the same first name (116:5, 127) and it is the same name that Wayerski used in Zach's presence.

exculpatory or impeaching; (2) the State suppressed the evidence, either willfully or inadvertently; and (3) the evidence must be material in that prejudice ensued from its suppression. *State v. Harris*, 2004 WI 64, ¶ 15, 272 Wis. 2d 80, 680 N.W.2d 737, (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)).

Only information within the State's exclusive possession is subject to disclosure under *Brady*. "Exclusive control will not be presumed where the witness is available to the defense and the record fails to disclose an excuse for the defense's failure to question him." *State v. Sarinske*, 91 Wis. 2d 14, 36, 280 N.W.2d 725 (1979).

A defendant does not suffer "prejudice" under *Brady* unless "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (footnote omitted). "[S]trictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler*, 527 U.S. at 281. The reasonable probability standard aligns with the harmless error standard. *See Id*. at 299; *see also State v. Randall*, 197 Wis. 2d 29, 38, 539 N.W.2d 708 (Ct. App. 1995) (applying harmless error analysis to assess the impact of the State's failure to disclose impeachment information regarding a witness' pending case).

Whether the State violated the defendant's right to due process under *Brady* is a question of constitutional fact subject to this court's independent review. *See State v. Sturgeon,* 231 Wis. 2d 487, 496, 605 N.W.2d 589 (Ct. App. 1999). The underlying historical facts as found by the trial court remain subject to the clearly erroneous test. *Id.*

B. Procedural history related to this claim.

The State charged Wayerski in July 2011 (1). John Clark, an inmate in the Chippewa County jail, contacted authorities following his contact with Wayerski. On

September 16, 2011, Eau Claire County Sheriff's Deputy Scott Kuehn met with Clark (122:8). Clark told Kuehn about Wayerski's statements to him while they were in the county jail. Clark did not ask for any consideration from law enforcement in exchange for his cooperation nor did law enforcement offer Clark anything for his statement (122:43-44).[4] In April 2012, Kuehn spoke with Clark to confirm that Clark was willing to have his identity disclosed. Kuhn documented this contact in his reports (122:9, 44-45).

When Kuehn spoke to Clark, Kuehn understood that Clark was on a probation hold (122:58). Kuehn was unaware of any pending criminal charges (122:55). The Chippewa County District Attorney did not charge Clark until September 7, 2012, almost a year after Kuehn interviewed Clark (122:57; 85:1).

Trial counsel knew that Clark was in jail (121:69). Trial counsel testified that he conducted a Circuit Court Automation Programs (CCAP) website check on Clark before trial. "[W]hen I did some background on Mr. Clark, CCAP, I was just concentrating on his convictions" (121:21). But later stated that he was not sure if he or his investigator "did any CCAPing on him" or just relied on other information (121:69).

In his response to Wayerski's postconviction motion, the prosecutor indicated that days before the trial, he learned about Clark's pending case through a CCAP search (88:19). At the postconviction hearing, the circuit court received the CCAP docket sheet for Clark's case (121:89). The docket sheet reflects documents for several events that

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[4] The record contains several manila envelopes that are marked confidential, but not assigned record numbers. One envelope is marked: "State v. Gary L. Wayerski, Confidential Transcripts, Judge William Stewart" and has a file stamp dated July 27, 2012, Dunn County Clerk of Court and Confidential. The prosecutor's name is on the envelope. The envelope includes several transcripts, including a transcript of Kuehn's 2011 interview with Clark.

occurred before Wayerski's trial on October 8, 2012, including the filing of the complaint, Clark's initial appearance, a waiver of time limits, and a bond hearing (84:3-5). The prosecutor obtained a copy of the complaint. The prosecutor did not believe that Clark's pending Chippewa County charges related to Wayerski's case or the veracity of Clark's statement years earlier. The prosecutor did not directly notify trial counsel of the pending case (88:19).

The State called Clark in rebuttal. Clark was in the Chippewa County jail on a probation hold in August and September 2011 (118:216). Clark had twenty prior convictions (118:216). Clark and Wayerski were housed together during this period (118:216-17). According to Clark, Wayerski made incriminating statements to him about his crimes (118:219-25). Clark testified that he was neither offered anything nor asked for a lighter penalty or sentence in any other matter in return for his testimony (118:225-26).

C. Information about Clark's pending charge constituted material impeachment evidence, but it was not in the State's exclusive possession.

A defendant has a right to challenge a witness' bias. The existence of pending criminal charges is a source of bias and an appropriate subject matter for cross-examination. *State v. Barreau*, 2002 WI App 198, ¶ 55, 257 Wis. 2d 203, 651 N.W.2d 12. Chippewa County's issuance of charges against Clark certainly provided grounds for Wayerski to challenge Clark's bias. The State agrees that this is material impeachment information. But the State disagrees that its failure to provide Wayerski with this piece of information constituted a *Brady* violation.

The State's *Brady* obligation is only triggered if the evidence is in the State's exclusive possession and control. *Sarinske*, 91 Wis. 2d at 36; *see also* cases cited in *State v. Amundson*, 69 Wis. 2d 554, 573, 230 N.W.2d 775 (1975).

Despite the supreme court's repeated references to "exclusive possession" in these cases, this Court, without reference to any authority, has previously placed the burden on the State to provide updated information about the State's witnesses. It stated that requiring a defendant to timely search public records would place "an intolerable burden on the defense; namely, to continually comb the public records to see if any of the State's witnesses are facing pending criminal charges." *Randall*, 197 Wis. 2d at 38.

The facts in this case, however, illustrate that the rationale in *Randall* no longer carries weight. The information about Clark's criminal charges was not only not in the State's exclusive possession or control,[5] it was a matter of public record, readily accessible and free to anyone through CCAP.

Here, the prosecutor learned about Clark's case filing shortly before trial through CCAP (88:19). Likewise, trial counsel used CCAP to check witness backgrounds (121:68). At one point in his testimony, trial counsel testified that he checked CCAP for information about Clark, but "was just concentrating on his convictions" (121:21). But later he said, "I can't state with one hundred percent specificity that I did any CCAPing on him" (121:69). Conducting a basic CCAP search is hardly "an intolerable burden on the defense" to perform.

Based on this record, this Court can reasonably conclude that information about Clark's pending charges was publicly available through CCAP, and not within the

[5] Wayerski has not suggested that the prosecutor or the investigators otherwise knew about Clark's pending charges before the prosecutor discovered that another prosecutor's office had filed charges shortly before trial. The circuit court found that the prosecutor did not intentionally withhold the evidence and that it was "simply a misunderstanding of the State's obligation to provide this information" (123:131).

State's exclusive possession or control. And if this Court reaches this conclusion, then no *Brady/Giglio* violation occurred. But if this Court determines that *Randall* controls,[6] even though the public now has greater access to court records than when this Court decided *Randall*, this Court must still decide whether the State's failure to disclose the pending charges prejudiced Wayerski.

D. The circuit court correctly determined that the State's failure to disclose information about Clark's recently filed case was harmless.

The circuit court applied harmless error analysis (123:131). Based on its review of the record, it found the evidence of Wayerski's guilt was substantial and denied his *Brady* claim (123:139). A review of the record supports the conclusion that there was no reasonable probability that disclosure of Clark's pending case would have resulted in a "not guilty" verdict.

Clark's credibility was impeached at trial. The jury knew that Clark was being held in jail on a probation hold when he spoke to Wayerski (118:216). It also knew that Clark had approximately twenty prior convictions (118:216). Wayerski also attacked Clark's credibility, asserting that the information that Clark provided was information that was readily accessible through other sources (119:80). As trial counsel observed, why would Wayerski ask Clark, who had twenty convictions, for advice as to how to handle his case (119:83).

In its analysis, the circuit court noted that Clark reported Wayerski's statements to authorities in September 2011, just over a year before his trial (123:132), and a year before Chippewa County authorities charged him (122:57;

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[6] *See Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (court of appeals is powerless to overrule or modify its own precedent).

85:1). The circuit court observed that Wayerski did not suggest that Clark's testimony was inconsistent with his prior statements, which prompted the circuit court to conclude that Clark's testimony was much the same as his prior statement (123:132).

The circuit court concluded that the jury would have found Wayerski guilty even without Clark's testimony due to the "compelling evidence" the State presented (123:135). After reviewing the entire trial record, the circuit court concluded that the victims provided detailed information about the incidents involving Wayerski. Physical evidence from Wayerski's apartment, the parents' statements, and Wayerski's roommate's statement, corroborated the victims' statements (123:136). The defense offered no alternative explanation for how a victim's DNA was found in the apartment (123:137). The circuit court also noted that Wayerski's testimony was inconsistent, undermining his credibility. It also observed that Wayerski's defense did not make sense in light of the overwhelming evidence (123:136-37).[7] Any error in failing to disclose the evidence about Clark's pending charge was harmless.

V. Sufficient evidence supported the jury's seven guilty verdicts on a charge of sexual assault of a child by a person who works or volunteers with children.

The jury found Wayerski guilty of seven counts of sexual assault of a child by a person who works or volunteers with children, contrary to Wis. Stat. § 948.095(3)(a) (38:1-2). Wayerski argues that the State presented insufficient evidence to convict of this offense. He

[7] In support of the harmless error argument, the State also relies on its summation of the record in its discussion of his ineffective assistance of counsel claim in Section I.C., above, and the admissibility of the sexually oriented evidence and harmless error analysis in Sections IIIB.1., & C above.

contends that nothing within subsection 948.095(3)'s plain language or the legislative history suggests that the Legislature intended to extend liability to law enforcement officers. Wayerski's Br. 46-49. As the State will demonstrate, the circuit court properly rejected this challenge to the sufficiency of the evidence.

A. General legal principles related to a sufficiency of the evidence challenge.

A court reviews a challenge to the sufficiency of the evidence in the light most favorable to the conviction. A reviewing court should not reverse a conviction based upon the insufficiency of the evidence unless the evidence is "so lacking in probative value and force" that no reasonable jury could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If more than one reasonable inference may be drawn from the evidence, the reviewing court must adopt the inference that supports the verdict. *Id.* at 503-04.

> If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

Id. at 507 (citation omitted). "Once the jury accepts the theory of guilt, an appellate court need only decide whether the evidence supporting that theory is sufficient to sustain the verdict." *State v. Mertes*, 2008 WI App 179, ¶ 11, 315 Wis. 2d 756, 762 N.W.2d 813 (citation omitted).

B. General legal principles related to the offense of sexual assault by a person who works or volunteers with children.

Wisconsin Stat. § 948.095(3)(a) provides:

> 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.

Wisconsin Stat. § 948.095(3)(d) identifies several occupations or volunteer positions that constitute "prima facie evidence that the occupation or position requires him or her to work or interact directly with children." These positions include teaching children, child care, youth counseling, youth organization, coaching children, parks or playground recreation, and school bus driving. *Id*.

The circuit court instructed the jury about the elements offenses, tracking the language from the standard jury instruction Wisconsin Jury Instruction—Criminal 2139A (Rel. No. 45—2007). Specifically, it advised the jury:

> [1] that the Defendant had attained the age of 21 years.
>
> [2] that the Defendant engaged in an occupation that required him to work or interact directly with children.
>
> [3] that the Defendant had sexual contact with JMH and/or JDP who were not the Defendant's spouse . . . .
>
> [4] That JMH and/or JDP had attained the age of 16 years and had not attained the age of 18 years.

> [5] that JMH and /or JDP were persons with whom the Defendant . . . interacted through his occupation.

(119:21-22).

C. General legal principles related to statutory interpretation.

Whether Wayerski engaged in an occupation that required him to work or interact with children presents a question of statutory interpretation. The interpretation of a statute and its application to a set of facts presents a legal question that an appellate court independently reviews. *Phelps v. Physicians Ins. Co. of Wis.*, 2009 WI 74, ¶ 36, 319 Wis. 2d 1, 768 N.W.2d 615. The interpretation of a statute begins with the text's plain meaning. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. If the meaning of the text is clear and unambiguous, then the Court ends its inquiry. Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.*

D. Wayerski engaged in an occupation that required him to work or interact directly with children.

Wayerski's challenge to the sufficiency of the evidence relates to the second element of Wis. Stat. § 948.095(3)(d): that Wayerski engaged in an occupation or participated in a volunteer position that required him to work or interact directly with children. In his review of § 948.095(3), Wayerski notes that neither its title nor its legislative history suggests the Legislature intended the statute to cover law enforcement officers. Wayerski's Br. 46. But Wisconsin courts ordinarily do not consult extrinsic sources of statutory interpretation, such as legislative history unless the statute's language is ambiguous. *Kalal*, 271 Wis. 2d 633, ¶ 50; *see also State v. Walczak*, 157 Wis. 2d 661, 665,

460 N.W.2d 797 (Ct. App. 1990) (title of a statutory section is not part of statute, but the court may consider it to resolve doubt about the statute's meaning).

Here, Wis. Stat. § 948.095(3)(a)'s plain language extends liability to a person "who engages in an occupation or participates in a volunteer position that requires him or her to work or interact directly with children." Paragraph (3)(d) lists several occupations and volunteer positions that presumptively fall within the class of people who are required to work or directly interact with children. But this list is not exclusive. Liability under paragraph (3)(a) is not limited to persons specified in paragraph (3)(d). Liability is not limited to specific occupations or position, but rather **any** occupation or position that involves working with or directly interacting with children.

Had the Legislature sought to more narrowly limit liability to a more discrete set of occupations or positions under Wis. Stat. § 948.095(3)(a), it knew how to do so. For example, subsection (2) creates a separate offense. But under paragraph (2)(b), liability for having sex with a child who has attained sixteen years of age is limited to a specific class of people: "a member of the school staff of the school or school district in which the child is enrolled as a student." Subsection (3) is intended to reach a broader class of persons who have contact with children outside of the school setting.

Law enforcement officers engage in an occupation that requires them to work with and interact directly with children. Working with children is a ubiquitous part of an officer's employment. Officers may have contact with a child who is a crime victim, crime suspect, or a witness to a crime or accident, injured and needs assistance. The Legislature has recognized the unique responsibilities that officers have in their interactions with children.

The Legislature has classified law enforcement officers as mandatory reporters for purposes of child abuse and neglect investigations. Wis. Stat. § 48.981(2)(a)29. When a mandatory reporter believes that a child is in immediate

danger, it may request a law enforcement agency to investigate. The request imposes a duty on the agency to immediately investigate the complaint, and if appropriate, refer the matter for criminal prosecution. Wis. Stat. § 48.981(2)(b). Further, as part of the intake process, an officer may make a recommendation concerning a child. Wis. Stat. § 48.25(5). Officers may take children into custody when they are injured, ill, or in immediate danger due to their surroundings. Wis. Stat. § 48.19(1)(d)5.

Officers are also required to engage with children who violate the law. For example, they may take a juvenile into custody whom they have reasonable grounds to believe committed an act which would constitute a crime. Wis. Stat. § 938.19(1)(d). They may issue citations to juveniles for ordinance violations. Wis. Stat. § 938.237. An officer may also conduct a custodial interrogation of a juvenile. Wis. Stat. § 938.195. A law enforcement officer may also make a recommendation concerning a juvenile to the intake worker. Wis. Stat. § 938.24(5).

Based on an officer's duty to protect abused and neglected children and enforce laws against juveniles who break them, an officer is engaged in an occupation that requires the officer to work with or directly interact with children.

The fact that an officer is required to work with or interact with children does not end the inquiry. Wisconsin Stat. § 948.095(3)(a) requires that the defendant worked with or interacted with the child as part of the defendant's occupation or volunteer position. The record demonstrates that Wayerski's relationship with JDP and JMH developed through his occupational contacts with them.

JDP was a person with whom Wayerski interacted as part of his occupation. JDP broke into the safe at his church in Wheeler where Wayerski served as the police chief (116:10). Wayerski investigated the theft complaint (118:80). JDP admitted the offense to Wayerski (116:10-11; 118:81). Wayerski met JDP's parents and discussed the procedures

that would be followed (118:81). According to Wayerski, the parents told him of the difficulty that they were having with JDP and asked for help getting JDP off drugs (118:82). The parents and Wayerski agreed that if other juveniles saw JDP with Wayerski, they would think that JDP was an informant and they would not give him drugs (118:83, 141). JDP's mother testified that Wayerski volunteered to help JDP get on the right track and keep him out of trouble (116:91).

JDP was placed on probation. Wayerski knew JDP's probation officer and offered to mentor JDP (116:12). As part of this process, JDP participated in ride-alongs with Wayerski twice a week, for a few months (116:13, 18-19). During these ride-alongs, Wayerski talked about sex with JDP (116:83). Through the ride-alongs, Wayerski stated that he could stay in touch with JDP and find out what was going on (118:83).

Social worker Melissa Duffenbach handled JDP's juvenile referral from Wayerski (118:211). According to Duffenbach, Wayerski expressed a willingness to work with JDP and speak with him. Wayerski reported that if other juveniles saw that JDP was speaking with Wayerski, the juveniles might leave JDP alone (118:213).

At one point, JDP told Wayerski that he was uncomfortable with Wayerski's sexual contact with him. Wayerski told JDP that if JDP told anyone, Wayerski would make JDP's home life worse and "threatened to put me in juvie" (116:39).

JMH was a person with whom Wayerski interacted as part of his occupation. Wayerski confronted JMH about the theft of an MP3 player at church. JMH admitted the theft. Wayerski issued JMH a ticket and JMH was ordered to perform community service. JMH stated "I was . . . on a probation type deal for about six months" (116:131). JMH's father confirmed that if JMH admitted the theft, returned the device to the victim, Wayerski would give JMH a citation that would include a fine and community service (116:111).

JMH's father stated that Wayerski would be the one who oversaw or supervised the community service (116:112). JMH would take part in ride-alongs with Wayerski (116:134; 118:104).

Wayerski testified that Dunn County took the initial theft complaint related to the MP3 player and that he finished the investigation (118:126-27). Wayerski confirmed that he told JMH's father that he would not jail JMH and issue a citation if JMH admitted the theft (118:96-97). But later he testified that the village attorney made the decision to issue the citation (118:129-30). Wayerski stated the village attorney asked if he would handle the community service portion of the disposition (118:131). The village president asked Wayerski to watch over JMH and JDP while they performed community service on a park project (118:132-33).

JMH stated he went back to Wayerski's residence because Wayerski stated that he would have JMH arrested. Wayerski told JMH that the whole ticket could be brought back up and Wayerski could put JMH "in jail or something along those lines" (116:143-44). JMH felt blackmailed (116:144).

The State presented sufficient evidence that demonstrated that: (a) as an officer, Wayerski worked in an occupation that required him to have contact and directly interact with children; and (b) both JMH and JDP were people with whom Wayerski interacted with in his capacity as an officer. In both cases, Wayerski was assigned to investigate theft-related crimes involving both children. He remained involved with both juveniles beyond his investigation, allowing them to participate in ride-alongs and supervising them as part of their community service.

Both JDP and JMH reported that Wayerski threatened them if they did not continue to cooperate—threatening to take JDP to "juvie" and arrest JMH on the subject of his citation.[8]

Based on the record, the State presented sufficient evidence to sustain the jury's verdict finding Wayerski guilty of violating Wis. Stat. § 948.095(3).

VI. Wayerski is not entitled to a new trial in the interest of justice.

Wayerski argues that he is entitled to a new trial in the interest of justice because the real issue was not tried. Wayerski's Br. 48-49. The State disagrees.

Wisconsin Stat. § 752.35 confers discretionary authority upon the court of appeals to review an otherwise waived error, reverse a judgment and order a new trial in the interest of justice. *See Vollmer v. Luety*, 156 Wis. 2d 1, 17-19, 456 N.W.2d 797 (1990). But a court should exercise this discretionary authority "infrequently and judiciously," only in "exceptional cases." *State v. Avery,* 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60 (citations omitted).

In a summary manner, Wayerski identifies two grounds for granting a new trial in the interest of justice. The first relates to the State's nondisclosure of pending charges against Clark, a rebuttal witness. The second concerns the circuit court's admission of other act evidence. These are the same arguments that Wayerski presented in support of his other claims of error. He has failed to

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[8] In his challenge, Wayerski relies on the testimony of a Dunn County Sheriff's Deputy who testified that it would not be standard practice for a law enforcement officer to be involved with or supervise a person performing community service. Wayerski's Br. 46. The question is not whether it is "standard practice," but whether Wayerski's conduct falls within Wis. Stat. § 948.095(3)'s scope. And as the State has argued, it does.

demonstrate why his case is exceptional and warrants this Court's exercise of its discretionary reversal authority. This Court should decline Wayerski's invitation to grant him a new trial in the interest of justice.

CONCLUSION

For the above reasons, the State respectfully requests this Court to affirm Wayerski's judgments of conviction and the circuit court's order denying Wayerski's motion for postconviction relief.

Dated this 13th day of May, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 10,988 words.

Dated this 13th day of May, 2016.

_____
DONALD V. LATORRACA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this 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 this 13th day of May, 2016.

_____
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