STATE OF WISCONSIN

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

DISTRICT III

Case No. 2022AP146-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOR S. LANCIAL,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER ENTERED IN DUNN COUNTY CIRCUIT COURT, THE HONORABLE ROD W. SMELTZER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

LORYN L. LIMOGES
Assistant Attorney General
State Bar #1094653

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
(608) 294-2907 (Fax)
limogesll@doj.state.wi.us

TABLE OF CONTENTS

PAGES

TABLE OF AUTHORITIES

PAGES

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

A jury convicted Lancial of ten counts of possession of child pornography for ten images found in the cache[1] file of the photo gallery application on his Samsung Galaxy phone. On appeal, he argues (1) there was insufficient evidence presented to establish he "knowingly possessed" the ten images since they were in an inaccessible part of his phone and his search history did not include any searches for child pornography; and (2) the circuit court should have suppressed the ten images of child pornography because the search of his phone exceeded the scope of the warrant.

First, *State v. Mercer*[2] is dispositive. To prove knowing possession, the State had to establish that the images were in an area over which Lancial had control and that he intended to exercise control over them. The child pornography was on his phone, his contention that someone else or a virus caused the child pornography was fully rebutted at trial, and the State offered uncontroverted testimony that the only way the photos would exist in the cache file was through Lancial's affirmative acts. Moreover, the State explained Lancial's lack of internet search history was due to his own evasive

---

[1] Applications on Samsung devices "continuously store temporary data" until the user "[cleans] out the app cache." Samsung, *How to clear the app cache and data on your Galaxy phone*, https://www.samsung.com/latin_en/support/mobile-devices/how-to-clear-the-app-cache-and-data-on-your-galaxy-phone/ (last visited May 31, 2022). As explained at trial, when a Samsung user clicks on a photo in the gallery application of their phone, a cache file is created which is "the exact same image except [a] smaller size." (R. 144:93.)

[2] *State v. Mercer*, 2010 WI App 47, 324 Wis. 2d 506, 782 N.W.2d 125.

measures. Therefore, sufficient evidence was presented that Lancial knowingly possessed child pornography.

Second, Lancial's argument that the search of his phone exceeded the scope of the warrant ignores the plain language of the warrant, and the precedent he cites is inapplicable to his case. The warrant explicitly authorized the search of phones, and the binding precedent he cites is either incomplete or deals with warrantless searches of cell phones and is therefore inapposite. Moreover, even accepting arguendo a constitutional violation, he fails to identify any police misconduct that would justify the extraordinary remedy of suppression in his case.

This Court should affirm.

ISSUES PRESENTED

1. Was sufficient evidence presented that supported the reasonable conclusion that Lancial knowingly possessed the ten images of child pornography found on his phone?

A jury convicted Lancial of all ten counts of possession of child pornography.

This Court should affirm the judgment of the factfinder.

2. Did the search of Lancial's phone for child pornography exceed the scope of the search warrant such that the circuit court should have suppressed the ten images of child pornography found on his phone?

The circuit court concluded the search of Lancial's phone was expressly authorized by the warrant and denied his motion to suppress the child pornography evidence.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the issues will be fully presented in the briefs. Publication is unwarranted because the issues can be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF THE CASE

Search Warrant

In April 2019, Menomonie Police Department received a cyber tip line report from the National Center for Missing and Exploited Children[3] that child pornography[4] was being downloaded at an IP[5] address associated with Richard Lancial, the father of Thor Lancial. (R. 2:6; 83.) Further investigation by NCMEC revealed "multiple other images" identified as child pornography associated with the Lancials' IP address. (R. 57:3.) The child pornography was accessed between March 2019 and June 2019. (R. 137:85, 120–23; 83; 84.)

Based on the above, Investigator Maloree Zassenhaus obtained a search warrant to search the Lancial address for evidence of possession of child pornography. (R. 148:7; 57.)

---

[3] The National Center for Missing and Exploited Children receives reports of suspected online child pornography and, pursuant to federal law, acts as a clearinghouse and makes referrals to local law enforcement. *See State v. Silverstein*, 2017 WI App 64, ¶ 5, 378 Wis. 2d 42, 902 N.W.2d 550 (detailing the common fact pattern in internet child pornography cases).

[4] On appeal, Lancial does not dispute the ten images found on his phone constituted child pornography. (Lancial's Br. 16.) The ten images are included in the appellate record. (R. 98; 99; 100; 101; 102; 103; 104; 105; 106; 107.)

[5] "An IP address is 'a unique address that identifies a device on the Internet.'" *State v. Baric*, 2018 WI App 63, ¶ 4, 384 Wis. 2d 359, 919 N.W.2d 221 (citation omitted).

The search warrant listed certain items, such as "laptops, tablets, or any electronic device that has user generated data stored in internal and external memory including e-mail, photos, video or other form of electronic communications or data included therein." (R. 57:1.) The warrant was explicit that its purpose was "to search said premises or phones for said things." (R. 57:1 (emphasis added).) The accompanying affidavit stated the child pornography would be "contained in [the Lancials'] electronic devices" and would include "pictures, videos, and emails" and requested a search warrant that authorized police "to search said premise, person(s), electronics for said data." (R. 57:3.)

Investigator Zassenhaus, with additional law enforcement, executed the warrant and eventually collected Lancial's phone. (R. 148:8, 16; 55.) Lancial's phone was identified quickly because Investigator Zassenhaus was "advised it was [his] phone" by someone at the address. (R. 148:16.) After searching the phone using an "advance logical extraction," which puts the data on a thumb drive where it can be analyzed using a program called Cellebrite,[6] Investigator Zassenhaus recovered over 7,200 images on Lancial's phone. (R. 137:97–98.) Most of the images were of underage females between four and 15 years of age "wearing tight leotards in gymnastic type poses." (R. 2:7.) Amongst the images, Investigator Zassenhaus identified some photos she "believed to be child pornography." (R. 137:98.) Eventually, ten images recovered from the phone were identified as child

[6] Cellebrite Physical Analyzer is a tool that allows law enforcement to recover and examine digital data from a range of digital devices, applications, the cloud, and warrant returns. Cellebrite, *Product Overview, Cellebrite Physical Analyzer*, https://cellebrite.com/wp-content/uploads/2020/09/ProductOverview_Cellebrite_Physical_Analyzer_A4_web.pdf (last visited May 31, 2022).

pornography. (R. 2; 98; 99; 100; 101; 102; 103; 104; 105; 106; 107.)

Lancial was charged with ten counts of possession of child pornography, a Class D felony. (R. 2.)[7]

Suppression Hearing

Lancial filed a motion to suppress the ten images of child pornography found on his phone arguing that Investigator Zassenhaus "searched the Samsung phone without a warrant." (R. 48:2.) Lancial's main argument, that he repeats on appeal, was that Investigator Zassenhaus "exceeded the scope of the warrant by looking at [the content] of these items" and that the warrant only provided authority to "locate those items." (R. 148:23–25.) The core of his argument was that the warrant "has to be specific" and in this case, since Lancial did not even live at the address, it was an "over extension of the authority granted by the warrant." (R. 148:24–25.)

At the suppression hearing, Investigator Zassenhaus described her process for obtaining the warrant. (R. 148:7–17.) She confirmed that at the time she downloaded the contents of Lancial's phone, "[her] understanding was that [for] any electronic device that was seized at the time of the warrant [she] had legal authority to download and enter into those devices for the data." (R. 148:19.)

The court denied the motion to suppress the ten images of child pornography. (R. 148:26.) The court concluded based on the warrant, affidavit, and testimony of Investigator Zassenhaus that there was "sufficient specificity to obtain the

---

[7] An Amended Complaint was filed that modified the date that Lancial possessed child pornography to "July 9, 2019." (R. 15.) Additionally, at the arraignment, the State explained that the Amended Complaint also changed the image that was charged for Count 6 as well as the file name for Count 5. (R. 130:3.)

items that were subject to that search at the address." (R. 148:25.) In support, the court referenced the line from the warrant that "specifically authorizes" the "search [of] said premise and/or phones for said things." (R. 148:25.)

Trial

At trial, various State witnesses testified. (R. 137; 144.) City of Menomonie Police Officer Jeremy Wilterdink testified about receiving the cyber tip from NCMEC that child pornography was being accessed from the Lancials' IP address in the spring of 2019. (R. 137:117–23; 83; 84.) Menomonie Police Lieutenant Kelly Pollock testified about her interview with Lancial on the day they executed the search warrant. (R. 137:156.) According to Lieutenant Pollock, Lancial denied looking at child pornography. (R. 137:162.) He acknowledged having a cell phone but told her he did not use it frequently to make phone calls because it was not active and could only be used on WiFi. (R. 137:163.) During this interview, Lancial confirmed that he was the "sole user of that cell phone." (R. 137:164.) Lancial told Lieutenant Pollock about someone he referred to as his niece having access to his phone. (R. 137:165.) According to Lieutenant Pollock, Lancial claimed his niece "used [his] cell phone to take photographs of gymnastic related things and may have downloaded images from gymnastics related things." (R. 137:165.) He asked her "questions about if it was possible that someone had hacked into their IP address or how [police] were able to link [child pornography] to his IP address." (R. 137:160–61.)

Investigator Zassenhaus testified about collecting Lancial's "Samsung Galaxy J7 cell phone" from the Lancial living room. (R. 137:197.) She confirmed that someone provided her with the passcode for the phone, but she could not recall who specifically provided it. (R. 137:207.) She also described the images she recovered from the phone as "[a] majority of the images were of girls either in gymnastics

leotards in different gymnastic poses as well as girls in . . . bikinis or swimsuits." (R. 137:211.)

Investigator Zassenhaus also testified about interviewing Lancial after his arrest and the interview itself was played for the jury. (R. 144:23; 95.) During the interview, Lancial admitted to owning the Samsung phone. (R. 95 at 9:50.) He told Investigator Zassenhaus that his friend Debbie Schmidt's "niece" downloaded some "gymnastic photos" on his phone. (R. 95 at 11:15–11:25.) He said he looked at porn on the phone "one time" and after that he had "pop-ups" on his phone. (R. 95 at 11:35–11:50.) He denied ever harming a child or looking at child pornography on his phone. (R. 95 at 16:25–17:30.) He stated he did not even know that the child pornography was there. (R. 95 at 18:05–18:20.) He denied being a "sexual predator or a sexual freak" and said that he liked "older women" that were his age. (R. 95 at 20:15–20:30.) He stated his main search engine was "Google" and denied knowing what the default browser was on his phone. (R. 95 at 21:00–21:40.) He denied having "any desire for children like that." (R. 95 at 28:35–28:45.) And he denied searching for child pornography. (R. 95 at 31:10.) Initially, Lancial lied about when he purchased a tablet that police had seized but eventually admitted that he bought the tablet a few months prior. (R. 95 at 33:10–34:25.) He said he lied because he did not want them to take the tablet away. (R. 95 at 34:30–35:05.)

Investigator Zassenhaus also testified that she tried to locate a "Debbie Schmidt," whose daughter Lancial claimed used his phone occasionally, but "none of them knew [Lancial]." (R. 144:29, 49.) Further she testified that, based on Lancial's suggestion there could be a virus on his phone, she did some tests to "determine if maybe it was infected with a virus" but explained there was not any malware or virus on the phone. (R. 144:30–31.) As to any suggestion that someone else put the photos on the phone, she testified that there was

"[n]o admission by any person that they put them there," and she confirmed that Lancial owned the phone. (R. 144:50–51.)

Anthony Stofferahn, a Digital Forensic Examiner with the Wisconsin Department of Justice, testified about his examination of Lancial's phone. (R. 144:69, 71.) He testified that Lancial's phone had minimal search history, which was explained by the presence of a "Tor Onion Browser as well as 12 VPNs." (R. 144:78.) The Tor Onion Browser can be used to "mask an IP address" and allows a user to "search through the internet . . . anonymously." (R. 144:78–79.) It allows the user to hide their web history. (R. 144:78.) Similarly, the VPNs—virtual protected networks—mask a user's IP address. (R. 144:79.) He explained that the VPN applications were not standard issue on phones and would have to be affirmatively downloaded. (R. 144:80–81.)

As to the location of the child pornography on Lancial's phone, Stofferahn explained that the photos were in the "cache file within the gallery of the device." (R. 144:88.) He explained that photos end up in the gallery application "[i]f [the user] take[s] the photo themselves with the device, download[s] images from the internet, [and] screenshots also get placed in the gallery." (R. 144:89.) According to Stofferahn's testimony, when a cell phone user clicks on a photo in the gallery application a cache file is created which is "the exact same image except smaller size." (R. 144:93.) Importantly, for an image to be in the cache folder, the user has to "go through this process" of clicking on a photo in the cell phone's photo gallery. (R. 144:93.) And, even if a user deletes a photo from the main gallery, the cache file will still contain the deleted photo. (R. 144:94.)

Verdict and Sentence

A jury found Lancial guilty of all ten counts of possession of child pornography. (R. 144:180–83; 124.)

Lancial was sentenced to four and a half years of initial confinement and ten years of extended supervision for each count, concurrent with one another. (R. 145:44–45.) At the sentencing hearing, Lancial stated that he was "not denying what was on [his] phone" and that he was "obviously in possession of it." (R. 145:36.) Further, he stated, "I'll take responsibility." (R. 145:37.)

Lancial appeals.

STANDARD OF REVIEW

Sufficiency of the Evidence. Whether the evidence was sufficient to sustain a guilty verdict presents a legal question that this Court reviews independently. *State v. Smith*, 2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410. "When conducting such a review, [this Court] consider[s] the evidence in the light most favorable to the State and [will] reverse the conviction only where the evidence 'is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" *Id*. (quoting *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). "[T]his [C]ourt will uphold [a guilty] conviction if there is any reasonable hypothesis that supports it." *Id*. "This ultimate test is the same whether the trier of the facts is a court or jury." *Gaddis v. State*, 63 Wis. 2d 120, 127, 216 N.W.2d 527 (1974).

Suppression. Appellate courts apply a mixed standard of review when reviewing a motion to suppress. *State v. Burch*, 2021 WI 68, ¶ 67, 398 Wis. 2d 1, 961 N.W.2d 314. First, this Court upholds the circuit court's findings of historical fact unless they are clearly erroneous. *Id*. Second, an appellate court reviews de novo the application of constitutional principles to those facts. *Id*.

ARGUMENT

I. The record contains sufficient evidence to support that Lancial knowingly possessed child pornography.

Lancial's sole challenge to the sufficiency of the evidence is that there was insufficient evidence presented that he "knowingly possessed" child pornography. (Lancial's Br. 16.) Lancial is wrong. Sufficient evidence existed to support his conviction and this Court should affirm.

A. Lancial bears a heavy burden challenging the sufficiency of the evidence.

A defendant bears a heavy burden challenging the sufficiency of the evidence. *State v. Norman*, 2003 WI 72, ¶ 66, 262 Wis. 2d 506, 664 N.W.2d 97. "It is well established that a finding of guilt may rest upon evidence that is entirely circumstantial and that circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence." *Poellinger*, 153 Wis. 2d at 501. Moreover, the standard in sufficiency of the evidence cases is "the same in either a direct or circumstantial evidence case." *Id.* If more than one reasonable inference may be drawn from the evidence, this Court adopts the inference that supports the verdict. *Id.* at 503–04.

"[T]he trier of fact is the sole arbiter of the credibility of witnesses and alone is charged with the duty of weighing the evidence." *State v. Below*, 2011 WI App 64, ¶ 4, 333 Wis. 2d 690, 799 N.W.2d 95 (citing *Poellinger*, 153 Wis. 2d at 506). In other words, it is exclusively the task of the trier of fact to decide which evidence is worthy of belief and which is not, and to resolve any conflicts in the evidence. *Poellinger*, 153 Wis. 2d at 506.

This Court is precluded from substituting "its judgment for that of the trier of fact unless the evidence, viewed most

favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *Id*. at 507. "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*. (emphasis added).

"This court . . . substitute[s] its judgment for that of the trier of fact [only] when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence [that] conflicts with the laws of nature or with fully-established or conceded facts." *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

B. Lancial does not meet his burden of demonstrating the evidence was insufficient to support his conviction.

Lancial's sole challenge to the sufficiency of the evidence is that there was insufficient evidence presented that he "knowingly possessed" child pornography.[8] (Lancial's Br. 16.) He does not dispute that the child pornography was on his phone or that it was, in fact, child pornography. (Lancial's Br. 16.) Instead, he argues that "[t]he evidence presented at trial was insufficient to prove beyond a

[8] The four elements the State was required to prove for a violation of Wis. Stat. § 948.12(1m) are that (1) the defendant knowingly possessed a recording, (2) the recording showed a child engaged in sexually explicit conduct, (3) the defendant knew or reasonably should have known that the recording contained depictions of a person engaged in actual or simulated sexual intercourse or lewd exhibition of intimate parts, and (4) the defendant knew or reasonably should have known that the person depicted in the recording was under the age of 18 years. Wis. JI–Criminal 2146A (2020).

reasonable doubt" that Lancial "knowingly possessed the ten images" of child pornography. (Lancial's Br. 15.) His argument is unpersuasive for three reasons: (1) *State v. Mercer*, 2010 WI App 47, 324 Wis. 2d 506, 782 N.W.2d 125, is dispositive, (2) sufficient evidence was offered that he knowingly possessed the ten images of child pornography found on his phone, and (3) the standard of review compels this Court to affirm.

First, his argument is unavailing because the main legal theory underlying his sufficiency of the evidence argument presents a question this Court already addressed in *Mercer*. The first part of Lancial's argument boils down to this: the State could not prove he knowingly possessed ten images of child pornography because it was in an inaccessible part of his phone. (Lancial's Br. 17.) He presents his case as a novel application of facts to Wis. Stat. § 948.12(1m). But this Court has already addressed "knowing possession" in cases where the evidence is not simply accessible pictures on a device.

In *State v. Mercer*, this Court held there was sufficient evidence of "knowing possession" where the proof was evidence from a computer monitoring software showing that the defendant searched for and obtained access to web sites and viewed pornography. *Mercer*, 324 Wis. 2d 506, ¶ 31. There, this Court held that an "individual knowingly possesses child pornography when he or she affirmatively pulls up images of child pornography . . . and views those images knowing that they contain child pornography." *Id.* Proof of the image's existence does not matter—whether it is in a hard drive or somewhere else, like a cache file. *Id.*

With *Mercer*, this Court identified the core of what constitutes knowing possession as this: "courts are more concerned with *how* the defendants got to the . . . child pornography, than *what* the defendants actually did with the images." *Id.* ¶ 29 (emphasis added). In all of those cases, the

"defendant *reached out* for the images." *Id*. Hence, "[w]hether the proof is hard drive evidence or something else, such as the monitoring software here, [it does] not matter because both capture a 'videotape' of the same behavior." *Id*. ¶ 31. Thus, in cases where evidence of child pornography is found in a cache storage area, the question is whether there was evidence that the "user affirmatively reached out for and obtained the images." *Id*. ¶ 29. It does not matter that the images were inaccessible to the user after the fact. In *Mercer*, this Court concluded there was sufficient evidence of knowing possession even where the images were inaccessible because the jury heard evidence from which it could infer the defendant deleted the photos. *Id*. ¶¶ 33–34.

Mercer's requirement that there be evidence of some affirmative act to constitute knowing possession is consistent with this Court's prior decision in *State v. Lindgren*, 2004 WI App 159, 275 Wis. 2d 851, 687 N.W.2d 60. Similar to here, the defendant argued that there was insufficient evidence of knowing possession because "no evidence of any child pornography had been saved on [his] computer" even though the State introduced exhibits of "five thumbnail images and six other images" that were found on Lindgren's hard drive. *Id*. ¶¶ 21, 23. This Court rejected his sufficiency of the evidence argument because the State's experts testified about affirmative acts the defendant needed to undertake for the images to even "have been stored on the hard drive." *Id*. ¶ 27. Likewise, in *State v. Schroeder*, 2000 WI App 128, ¶ 20, 237 Wis. 2d 575, 613 N.W.2d 911, this Court concluded that the defendant's subscription to online newsgroups that distributed child pornography was relevant and probative to show the defendant "knowingly possessed child pornography." This Court's precedent is clear: even if the actual child pornography is inaccessible, evidence of a defendant's affirmative acts may prove up knowing possession in child pornography cases.

In short, Lancial's legal theory that the State failed to prove he knowingly possessed the images because "the images were in a hidden, inaccessible folder" misses the mark. (Lancial's Br. 19.) The State did not need to prove that it located *accessible* images of child pornography to prove that Lancial knowingly possessed those images. Instead, the State needed to prove that Lancial had actual physical control of the images or that the images were in an area over which he had control and that he intended to exercise control over them. Wis. JI–Criminal 2146A (2020).

Second, the record supports the reasonable inference that the ten images of child pornography were, at the times alleged, in an area over which Lancial had control and that he intended to exercise control over them. As to the area of exclusive control, the child pornography was found on Lancial's phone, and he told Lieutenant Pollock that "he was the sole user of that cell phone." (R. 137:164.) Although Lancial initially told investigators about someone he referred to as his niece using the phone to download "gymnastic related things," additional investigation revealed that no such niece existed. (R. 137:165; 144:48–49.) Beyond Lancial's false claim that a "niece" used his phone, there was "[n]o admission by any person that they put [the child pornography images] there." (R. 144:51.) The State offered uncontroverted testimony that child pornography was downloaded from a device associated with the Lancials' IP address in spring of 2019. (R. 137:117–23; 83; 84.) The only device that contained child pornography was Lancial's phone. Moreover, the State explained that the lack of metadata was because Lancial deleted the photos. (R. 144:104.) Moreover, it is undisputed that the only way that cached images could get onto the phone is if the user affirmatively downloaded such images. (R. 144:93–94.) Thus, sufficient evidence was offered that the child pornography was found in an area over which Lancial had exclusive control, specifically his cell phone.

As to evidence that he intended to exercise control over the child pornography, sufficient evidence was offered that established Lancial intended to exercise control over the ten images of child pornography found on his phone. Lancial argues that the State presented "no information about when or how the images in the cache folder came to be on [Lancial's] phone," but that is not supported by the record. (Lancial's Br. 19.) Officer Wilterdink testified about the cyber tip line report from NCMEC about child pornography being accessed from the Lancials' IP address in March and June of 2019. (R. 137:117–23.) Both Anthony Stofferahn and Investigator Zassenhaus testified about finding the child pornography on Lancial's cell phone, specifically in the "cache file within the gallery of the device." (R. 144:88.) Further, all the photos, except for number 6 which was a downloaded photo, were screenshots of an image. (R. 144:46–47.) Thus, all the photos were the result of affirmative acts of Lancial.[9]

Moreover, the State explained the lack of web browsing history was due to the "Tor Onion Browser as well as 12 VPNs," all of which were not "standard" issue on phones and required that Lancial download them from the internet. (R. 144:78, 80–81.) The jury reasonably concluded the reason there was no search history evidence is because Lancial purposely shielded it. Indeed, the lack of an internet search history is not fatal in child pornography cases. *Mercer* does not specifically require evidence of internet search history to find evidence of knowing possession. Rather, this Court relied

---

[9] Lancial cites to *United States v. Flyer*, 633 F.3d 911, 919 (9th Cir. 2011), where the court declined to find knowing possession when the child pornography was found in an unallocated space on a hard drive. That case is not binding on this Court, and it is distinguishable since, unlike here, there was no evidence presented at trial how the defendant "accessed, enlarged, or manipulated" any of the images nor was there evidence that he viewed the images in the charged timeframe. *Id.*

on Mercer's "habit of surfing the [i]nternet for pornography" to establish knowing possession. 324 Wis. 2d 506, ¶ 33. Because the State in *Mercer* presented expert testimony that the child pornography evidence was due to affirmative acts, and not a computer virus or pop-up ads, this Court found sufficient evidence of knowing possession. *Id.* ¶ 41. At base, *Mercer* requires evidence of "how" a defendant got to the images since the key is that the defendant affirmatively "*reached out* for the images" and intended to exercise control over them. *Mercer*, 324 Wis. 2d 506, ¶ 29.

Important here, the State explained the affirmative acts Lancial needed to undertake for the child pornography to even exist in the cache folder of the gallery application of his phone. Anthony Stofferahn testified about how a photo would end up in the cache file of a user's photo gallery. (R. 144:93; 96.) First, the user would need to "take the photo themselves with the device, download images from the internet, [or take] screenshots." (R. 144:89.) Next, when a user clicks on a photo in the gallery application of their phone, a cache file is created which is "the exact same image except smaller size." (R. 144:93.) And even when a photo is deleted from the photo gallery application, the photo will still be in the cache file. (R. 144:94.) Thus, for the child pornography to even end up in the cache folder of Lancial's gallery application, Lancial had to affirmatively "go through this process." (R. 144:93.) Moreover, the State fully rebutted the possibility that a virus could have caused the child pornography. (R. 144:30–31.) Accordingly, Lancial's argument that the State "presented no evidence that Mr. Lancial had searched the internet for child pornography" is not true. (Lancial's Br. 18.) The jury reasonably concluded that the reason there was no search history for child pornography was because Lancial purposely shielded it.

Further, the State offered unrebutted evidence that reflected on Lancial's consciousness of guilt. The State referred to Lancial's evasive and contradictory responses to

law enforcement about the child pornography on his phone. During his interview with Lieutenant Pollock, Lancial tried to blame the "gymnastics related" photos on his phone on a nonexistent "niece." (R. 137:165.) He also lied to Investigator Zassenhaus about when he acquired a tablet because he did not want her to take the tablet away. (R. 95 at 34:55–35:05.) Testimony at trial explained that Lancial's phone had a "Tor Onion Browser" and "12 VPNs" and that both are used to "mask an IP address" and allow for anonymity while searching the internet. (R. 144:78–79.) The presence of such tools explained why Lancial's phone had minimal search history and informed the jury that Lancial undertook evasive measures to hide his search history. (R. 144:78–79.)

Lastly, the standard of review in this case dictates that this Court should affirm the judgment of the factfinder. When the evidence supports more than one inference, this Court must accept the inference drawn by the jury unless the evidence on which that inference was based is incredible as a matter of law. *Poellinger*, 153 Wis. 2d at 506–07. Here, Lancial does not develop an argument on what other inference the jury should have taken from the evidence. (Lancial's Br. 16–20.) Nor does he argue that the circumstantial evidence of knowing possession was incredible as a matter of law. Instead, he only argues the State failed to establish knowing possession at trial. (Lancial's Br. 20.) His argument ignores this Court's deferential standard of review in sufficiency of the evidence cases; this Court upholds the jury's verdict so long as any reasonable hypothesis supports it. *Poellinger*, 153 Wis. 2d at 506–07.

Therefore, to the extent Lancial's argument is that the jury could have concluded another person or computer virus caused the child pornography, his argument is unavailing. No evidence was presented at trial that supported this conclusion. Instead, the jury heard evidence that child pornography was downloaded from the Lancials' IP address,

the child pornography was found on Lancial's phone, and expert testimony established the affirmative acts that Lancial needed to execute for that child pornography to even exist in the cache file of his photo gallery application. (R. 137:117–23; 144:88–93.) The State fully rebutted the possibility of a virus or other malware causing the child pornography. (R. 144:30–31.) Moreover, there was no evidence that anyone, other than Lancial, ever owned the phone. (R. 144:50–51.) This supported the reasonable inference that Lancial knowingly possessed child pornography contrary to section 948.12(1m). In other words, the only inference from the evidence was that Lancial knowingly possessed child pornography.

Because the evidence discussed is not incredible as a matter of law and provided a sufficient factual basis for the jury's findings that Lancial knowingly possessed child pornography on the relevant dates, this Court should affirm.

II. The circuit court properly denied Lancial's motion to suppress the ten images of child pornography found on his phone.

At the start, it is important to note what Lancial is not challenging on appeal. He does not challenge the validity of the search warrant in general nor does he "dispute that law enforcement lawfully searched the residence and seized his phone." (Lancial's Br. 21–23.) His sole argument is that the search warrant "did not provide officers with authority to search [his] cell phone." (Lancial's Br. 20.) This Court should affirm for two reasons: (1) the warrant authorized the search of his phone and (2) even if it did not, the good faith exception counsels against suppression in this case.

A. A warrant must state with particularity its purpose.

The Fourth Amendment to the United States Constitution and Article I, § 11, of the Wisconsin Constitution

protect "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend. IV; Wis. Const. art. I, § 11. The Wisconsin Supreme Court has historically interpreted article I, § 11, and its protections against unreasonable searches and seizures in a manner consistent with the United States Supreme Court's interpretations of the Fourth Amendment. *State v. Felix*, 2012 WI 36, ¶ 38, 339 Wis. 2d 670, 811 N.W.2d 775 (finding no reason "to depart from our customary practice of interpreting Article I, Section 11 in accord with the Fourth Amendment"). These provisions also establish the requirements to issue a constitutional warrant. *State v. Henderson*, 2001 WI 97, ¶ 17 & n.4, 245 Wis. 2d 345, 629 N.W.2d 613.

A search warrant passes constitutional muster under the Fourth Amendment's warrant requirement if it satisfies three requirements. *State v. Tate*, 2014 WI 89, ¶ 28, 357 Wis. 2d 172, 849 N.W.2d 798 (citing *State v. Sveum*, 2010 WI 92, ¶ 20, 328 Wis. 2d 369, 787 N.W.2d 317.) First, a neutral and detached magistrate must issue the warrant. *Id*. Second, the applicant for the warrant must demonstrate on an oath or affirmation that probable cause exists to believe that the evidence sought will aid in a particular conviction for a particular offense. *Id*. Third, and relevant here, the warrant must state with particularity the places to be searched and the items to be seized. *Id*.

As to the particularity requirement, warrants must "particularly describe the place[s] to be searched, as well as the items to be seized." *Henderson*, 245 Wis. 2d 345, ¶ 19. "In order to satisfy the particularity requirement, the warrant must enable the searcher to reasonably ascertain and identify the things which are authorized to be seized." *State v. Noll*, 116 Wis. 2d 443, 450–51, 343 N.W.2d 391 (1984). Wisconsin law requires that the language used in the warrant should be such that the officer executing the warrant can identify the

property with reasonable certainty. *Anderson v. State*, 192 Wis. 352, 355, 212 N.W. 628 (1927).

Accordingly, technical descriptions are not required. *Id.* at 357. "A general description of the items to be seized is constitutionally acceptable when a more specific description is not available." *Sveum*, 328 Wis. 2d 369, ¶ 27. For example, in *State v. Petrone*, 161 Wis. 2d 530, 468 N.W.2d 676 (1991), *overruled on other grounds by State v. Greve*, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479, the court rejected a particularity challenge to a search warrant that identified the objects of the search with the general language "all camera, film, or photographic equipment." *Id.* at 537–38.

The court concluded that the more general description was appropriate because the officers lacked information describing the type of film or brand of camera used to commit the alleged crime. *Id.* at 541. The court also held that the officers acted within the scope of the warrant when they developed film off premises because the film could have reasonably contained the kind of photographs described in the warrant. *Id.* at 543–45; *see also State v. Marten*, 165 Wis. 2d 70, 75, 477 N.W.2d 304 (Ct. App. 1991) (concluding the officers executing a search warrant "are entitled to the support of the usual inferences which reasonable people draw from facts").

And, even where a warrant contains only general language, it can be rendered adequate by references in an affidavit that are properly incorporated into the warrant. *Castle News Co. v. Cahill*, 461 F. Supp. 174, 181 (E.D. Wis. 1978) (citing *United States v. Freeman*, 532 F.2d 1098 (7th Cir. 1976)). This is consistent with the legislative intent behind Wis. Stat. § 968.22 which provides "[n]o evidence seized under a search warrant shall be suppressed because of technical irregularities not affecting the substantial rights of the defendant."

B. The search warrant specifically allowed for the search of Lancial's phone.

Lancial challenges neither the neutrality of the judge who issued the search warrant nor the existence of probable cause as alleged in the supporting affidavit. (Lancial's Br. 23.) His appeal focuses on whether the warrant authorized the search of his phone. (Lancial's Br. 23.) This Court should affirm for two reasons: (1) the warrant explicitly authorized the search of phones found at the Lancials' address, and (2) the precedent he cites is incomplete and inapplicable to his case.

First, the warrant explicitly authorized the search of phones found on the premises. The circuit court denied Lancial's suppression motion based on the plain language of the warrant, the testimony of Investigator Zassenhaus, and the affidavit that was submitted with the warrant. (R. 148:25.) The court based its decision on the line of the search warrant that stated, "search said premise[s] and/or phones for said things." (R. 148:25.)

The record supports the circuit court's decision. The first page of the warrant lists items which may constitute "evidence of a crime," like "laptops, tablets or any electronic device that has user generated data stored in internal and external memory." (R. 57:1.) The warrant includes a line that is explicit that the search warrant to be issued was "to search said premises or phones for said things"—in this case, child pornography. (R. 57:1.) The use of the word "phone," although general, passes constitutional muster in this case. Just like the officers in *Petrone*, Investigator Zassenhaus had no way to know exactly where the child pornography might be prior to executing the warrant. (R. 57:2–3.) The information provided by NCMEC only indicated that child pornography was downloaded with an electronic device associated with the Lancials' IP address. Thus, the warrant in this case described the items subject to the warrant "with as much particularity

and specificity as the circumstances and the nature of activity under investigation permitted." *Petrone*, 161 Wis. 2d at 541. While Lancial argues "that is the only place in the warrant that the term 'phone' is used," he fails to explain why the explicit authorization to "search said premises or phones" is insufficient for Fourth Amendment purposes. (Lancial's Br. 24.) Thus, Lancial is simply wrong to assert that the warrant allowed only for his phone to be seized and not searched. (Lancial's Br. 21.) Accordingly, this Court should affirm based on the plain language of the warrant.

But even if this Court concludes that the warrant lacked sufficient specificity, Investigator Zassenhaus's accompanying affidavit is clear that the search warrant was to "search said premise, person(s), electronics for said data." (R. 57:3.) The affidavit is explicit that the evidence of child pornography would be "contained in their electronic devices" and would include "pictures, videos, and emails." (R. 57:3.) Because the warrant references Investigator Zassenhaus's affidavit, (R. 57:1), this Court should decline Lancial's invitation to overturn his conviction based on what amounts to, at most, a clerical error. *See Castle News Co.*, 461 F. Supp. at 181; *see also* Wis. Stat. § 968.22. The warrant and accompanying affidavit are clear that the warrant was to seize certain items and search their contents for evidence of child pornography. Accordingly, Lancial's argument that the search warrant "authorized only the search of the premises and vehicles associated therewith" ignores the plain language of the warrant and accompanying affidavit. (Lancial's Br. 24.)

Second, the precedent he cites offers either an incomplete picture of the law or deals exclusively with *warrantless* searches of cell phones and is thus not applicable to his case. For starters, his argument that cell phones are excluded from the general principle that a premises warrant also authorizes the search of items that are plausible receptacles of the objects of the search is not born out by the

precedent he cites. His argument here ignores this Court's decision in *State v. Schaefer*, 2003 WI App 164, ¶ 21, 266 Wis. 2d 719, 668 N.W.2d 760. In *Schaefer*, this Court upheld the search of a defendant's computer for child pornography even though the premises warrant did not specifically authorize such a search. *Id.* ¶ 20. Because the computer could reasonably contain evidence of child pornography due to its ability to store photographs, this Court upheld the search. *Id.* ¶ 21. There, this Court reiterated that "police may search all items found on the specified premises that are plausible repositories for objects named in the search warrant." *Id.* (citing *State v. Andrews*, 201 Wis. 2d 383, 403, 549 N.W.2d 210 (1996)). Here, a Samsung Galaxy phone, with the capability to search the internet and store photos, is a reasonable repository of evidence of possession of child pornography.

Next, *State v. Andrews*, dealt with whether officers could search a visitor's duffel bag when executing a general premises warrant. *Andrews*, 201 Wis. 2d at 386. There, the Wisconsin Supreme Court held that the search of the visitor's bag "was proper under the warrant because the duffel bag was not in [the visitor's] possession at the time, and could reasonably contain the marijuana, baggies or paraphernalia sought." *Id.* The court held that "police can search all items found on the premises that are plausible repositories for objects named in the search warrant, except those worn by or in the physical possession of persons whose search is not authorized by the warrant, irrespective of the person's status in relation to the premises." *Id.* at 403 (footnote omitted). *Andrews* does not mention cell phones, let alone explicitly preclude them from this principle.

The rest of the precedent he cites deals with warrantless searches of cell phone data and is inapplicable to his case. In *Carpenter v. United States*, 138 S. Ct. 2206 (2018), the United States Supreme Court dealt with whether the

Government's *warrantless* acquisition of Carpenter's cell phone records from a third-party wireless carrier had Fourth Amendment implications. The question before the court was how to apply the Fourth Amendment given a third-party cell phone carrier's ability to "chronicle a person's past movements through the record of his cell phone signals." *Id*. at 2216. There, the court concluded that individuals maintain a legitimate expectation of privacy in the record of their physical movements as captured by their third-party cell phone carrier. *Id*. at 2217. Thus, the court issued a "narrow" decision that the Government will generally need a warrant to access cell phone records from a third-party carrier. *Id*. at 2220. In short, *Carpenter* had nothing to do with whether a general premises search warrant extended to cell phones.

Similarly, *Riley v. California*, 573 U.S. 373 (2014), and *Burch*, 398 Wis. 2d 1, do not help Lancial's argument here. Both dealt with *warrantless* searches of cell phones. In *Riley*, the United States Supreme Court held that a warrantless search of a cell phone was not justified by the search incident to arrest exception to the warrant requirement. In *Riley*, the court dealt with the question of "how the search incident to arrest doctrine applies to modern cell phones." *Riley*, 573 U.S. at 385. Because of the "vast quantities of personal information" in modern cell phones, the court declined to extend its rationale in *United States v. Robinson*, 414 U.S. 218 (1973), to searches of cell phones and held that "officers must generally secure a warrant before conducting such a search." *Riley,* 573 U.S. at 386. The court was clear, however, that its holding in *Riley* was "not that the information on a cell phone is immune from search; it is instead that a warrant is

generally required before such a search, even when a cell phone is seized incident to arrest." *Id*. at 401.[10]

In short, none of the precedent Lancial cites is directly applicable to his argument or case. And, even accepting arguendo a constitutional violation, the good faith doctrine precludes suppression in this case.

C. Even accepting arguendo that the search warrant was flawed, exclusion is not an appropriate remedy.

The good-faith exception to the warrant requirement counsels against suppression in this case. Thus, even accepting arguendo that the search warrant was flawed, exclusion is not an appropriate remedy. In the event of an unconstitutional search, this Court may invoke the exclusionary rule if no exception to the warrant requirement exists. *Tate*, 357 Wis. 2d 172, ¶ 30 (citing *Sveum*, 328 Wis. 2d 369, ¶ 31 & n.8). But the purpose of the exclusionary rule is to deter police misconduct; therefore, exclusion is "warranted only where there is some present police misconduct, and where suppression will appreciably deter that type of misconduct in the future." *Burch*, 398 Wis. 2d 1, ¶ 17 (citing *Davis v. United States*, 564 U.S. 229, 237 (2011)). As the Wisconsin Supreme Court outlined in *Burch*, "the principle is clear: unless evidence was obtained by sufficiently deliberate and sufficiently culpable police misconduct, '[r]esort to the massive remedy of suppressing evidence of guilt is

---

[10] Lancial also cites to *State v. Russo*, 336 P.3d 232 (Idaho 2014), in support of his argument. (Lancial's Br. 26.) That case is not binding on this Court and, moreover, is inapplicable. In *Russo*, the warrant at issue only authorized the search of the property and seizure of the defendant's cell phone. *Id*. Because the warrant "did not purport to authorize the search of a cell phone," the court held the search unconstitutional. *Id*. at 306. But here, the warrant *explicitly* authorizes the search of "said premises or phones" for the child pornography. (R. 57:1.)

unjustified.'" *Id*. ¶ 21 (alteration in original) (quoting *Hudson v. Michigan*, 547 U.S. 586, 599 (2006)).

In *Burch*, the Wisconsin Supreme Court *declined* to suppress evidence obtained in a warrantless search of a cell phone because "regardless of whether the data was unlawfully obtained or accessed, [the court] conclude[d] suppression of the data is not warranted under the exclusionary rule." *Burch*, 398 Wis. 2d 1, ¶ 15 (citing *Herring v. United States*, 555 U.S. 135, 139 (2009)). There, the court was explicit that suppression is "warranted only where there is some present police misconduct, and where suppression will appreciably deter that type of misconduct in the future." *Id*. ¶ 17. And "when the police act with an objectively reasonable good-faith belief that their conduct is lawful," exclusion is not an appropriate remedy. *Id*. (quoting *Davis*, 564 U.S. at 238). Lancial's argument is untethered from the majority's holding in *Burch* and therefore unpersuasive. He does not reconcile his argument with the purpose of the exclusionary rule or identify any police misconduct that would be deterred by suppressing the child pornography police found on his phone.

In the case of a flawed warrant, Wisconsin adopted the good-faith exception to the exclusionary rule in *State v. Eason*, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625. There, the Wisconsin Supreme Court held that where police officers act in objectively reasonable reliance upon a facially valid search warrant the good-faith exception to the exclusionary rule applies under the Wisconsin Constitution. *Eason*, 245 Wis. 2d 206, ¶ 63. But, unlike in *United States v. Leon*, 468 U.S. 897 (1984), Wisconsin requires a significant investigation and review of the warrant application for the good-faith exception to apply. *Eason*, 245 Wis. 2d 206, ¶ 63. At bottom, good faith depends on whether a "'reasonably well trained officer would have known that the search was illegal' in light of 'all the

circumstances.'" *State v. Dearborn*, 2010 WI 84, ¶ 36, 327 Wis. 2d 252, 786 N.W.2d 97 (citation omitted).

Here, Lancial fails to identify any police misconduct or behavior that would be deterred by overturning his conviction and suppressing the ten images of child pornography found on his phone. The record is clear that Investigator Zassenhaus thought, based on her experience and the language in the warrant, she "had legal authority to download and enter into those devices for the data." (R. 148:19.) The requirements of *Eason* were met in this case. The affidavit listed Investigator Zassenhaus's credentials and the investigation that she undertook in this case to secure the warrant and, again, Lancial does not even challenge the probable cause underlying the warrant. (Lancial's Br. 23.)

In short, even accepting a constitutional violation, the extraordinary remedy of suppression serves absolutely no purpose in this case. Lancial does not identify any police misconduct or future deterrent effect that would somehow justify ignoring reliable, trustworthy evidence bearing on his guilt. *See Burch*, 398 Wis. 2d 1, ¶ 18 (noting that exclusion is a "last resort" and should occur only when the deterrent value outweighs the heavy societal cost).

* * * * *

Sufficient evidence existed from which a reasonable factfinder could conclude Lancial knowingly possessed the ten images of child pornography found on his phone. Moreover, the search warrant authorized the search of his phone for the child pornography and, even if it did not, the good faith exception counsels against suppression in this case.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 5th day of July 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Loryn L. Limoges
LORYN L. LIMOGES
Assistant Attorney General
State Bar #1094653

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
(608) 294-2907 (Fax)
limogesll@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 8,137 words.

Dated this 5th day of July 2022.

Electronically signed by:

Loryn L. Limoges
LORYN L. LIMOGES
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 5th day of July 2022.

Electronically signed by:

Loryn L. Limoges
LORYN L. LIMOGES
Assistant Attorney General