STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2022AP2051-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACOB RICHARD BEYER,

Defendant-Appellant.

APPEAL FROM A JUDGMENT ENTERED IN
DANE COUNTY CIRCUIT COURT, THE
HONORABLE MARIO D. WHITE, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUES PRESENTED

While conducting an online investigation of the transmission of child pornography over a peer-to-peer file sharing network, an investigator downloaded a video file containing child pornography made available through the network and which came from an IP address associated with Jacob Richard Beyer's residence. Officers later executed a search warrant at his residence and found child pornography on a hard drive.

After the State charged Beyer with possession of child pornography, Beyer filed two pretrial motions. First, he moved to compel discovery, including access to the agent's computer and undercover investigative software. Second, Beyer moved to suppress evidence seized during the search warrant, alleging that the warrant's supporting affidavit lacked probable cause and included false or misleading statements, made intentionally or with a reckless disregard for the truth. The court denied both motions. Then, sitting as the factfinder, the court found Beyer guilty of possession of child pornography.

1. Did Beyer have a due process right to pretrial discovery of evidence, including the inspection of the investigator's computer and undercover investigative software, for the purpose of litigating his suppression motion?

The circuit court denied Beyer's discovery request.

This Court should answer: No. This Court should hold that the circuit court's decision denying Beyer the right to inspect the agent's computer and undercover investigative software did not violate his due process rights.

2. Did the warrant's supporting affidavit demonstrate probable cause?

The circuit court answered: Yes.

This Court should answer: Yes. This Court should determine that the affidavit established probable cause and that Beyer did not meet his burden under *Franks* and *Mann*[1] to demonstrate that statements in the affidavit were false or made with a reckless disregard for the truth.

3. Did the State present sufficient evidence to support Beyer's conviction for possession of child pornography based on the image associated with Count 1?

The circuit court, as the factfinder, answered: Yes.

This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. This Court can decide Beyer's case based on the application of settled-legal principles. That said, publication on the discovery issue may be warranted under Wis. Stat. § (Rule) 809.23(1)(a)5. Publication may also be appropriate if this Court interprets the phrase "accesses in any way with the intent to view," as used in Wis. Stat. § 948.12(1m), to decide this case.

[1] *Franks v. Delaware*, 438 U.S. 154 (1978); *State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985).

STATEMENT OF THE CASE

A. After discovering that someone at Beyer's residence had uploaded child pornography over the Internet, officers obtained and executed a search warrant for Beyer's residence and found child pornography on his computer.

Madison Police Department Detective Scott Sachtjen applied for a search warrant to search Beyer's residence for evidence of possession of child pornography on computers and other electronic storage devices. (R. 55:2–3.) Sachtjen's affidavit relied on his training and experience, as well the investigation of Wisconsin Department of Justice Special Agent Jeffrey Lenzner, who, during his investigation of a peer-to-peer file sharing network, determined that someone at Beyer's residence had uploaded a video file containing child pornography. (R. 55:6–16, 24.)

Relying on Agent Lenzner's information, Sachtjen's affidavit detailed how BitTorrent, a peer-to-peer file-sharing network, facilitated how the networks users, or "peers," exchange files with each other. (R. 55:8.)[2] When a user installs BitTorrent, they establish settings that allow them to automatically upload, or share, designated files with other peers and simultaneously download other peers' shared files. (R. 55:8–9.) Files shared on BitTorrent are identified by "torrents," which contain data about each shareable file, including the file name and its "hash value," which is a unique digital signature assigned to the file. (R. 55:7, 9.) Peers can search torrent indexing websites for files of interest, select a torrent of interest from the list, and download the file.

[2] Sachtjen's affidavit relied on information that Lenzner provided about peer-to-peer investigations generally, (R. 55:8–14), and Lenzner's investigation in this case, including Lenzner's investigative report, which was included as an attachment, (R. 55:15, 22–25).

(R. 55:9–10.) The downloaded file is saved to the user's BitTorrent shared file folder, which then becomes available to share with other peers. (R. 55:10.)

Sachtjen's affidavit detailed how Agent Lenzner used investigative software to determine that suspected child pornography was on a computer associated with Beyer's IP address. Through software, including "Roundup Torrential Downpour," an agent can search peer-to-peer networks, like BitTorrent, to identify computers used to share suspected child pornography. (R. 55:12–13.) Roundup does this by comparing the unique hash values of previously identified child pornography files compiled in law enforcement databases against the hash values of files being shared on the peer-to-peer network. (R. 55:12.)

On October 28, 2017, while investigating peer-to-peer sharing of child pornography, Lenzner discovered that a file containing a video of an adult male and prepubescent female having sexual contact was available from a particular IP address, and he downloaded the file. (R. 55:22–24.) On October 30, 2017, Lenzner served a subpoena on the Internet service provider for subscriber information related to the IP address. (R. 1:6; 55:15.) On November 21, 2017, the provider told Lenzner that Beyer was the IP address's subscriber. (R. 55:15.)

On December 6, 2017, the Honorable John D. Hyland issued a search warrant for Beyer's residence. (R. 55:19; 66:4.) On December 7, 2017, Sachtjen and other officers executed the warrant at Beyer's residence. (R. 1:6.) A digital forensic examiner, Stacey Sadoff, located ten images of suspected child pornography on a computer hard drive found during the search. (R. 1:9.) Beyer told Sachtjen that he searched torrent sites, that he downloaded image and video files of child pornography, and that he deleted some files and saved other files to his computer, identifying the pathname to the folders where the files were saved. (R. 1:8.)

The State charged Beyer with ten counts of possession of child pornography. (R. 1:1–5.)

B. The court denied Beyer's pretrial motion for discovery and motion to suppress the evidence seized through the warrant.

When Beyer's computer examiner could find no evidence of the video file that served as the basis for the search warrant, Beyer filed a "Notice of Motion and Motion to View the State's Computer and its Undercover Software," i.e., the computer Lenzner used during his investigation. (R. 50; 51:2.) Beyer claimed a "right to make sure that the [video] alleged to have been seen by the agent was actually seen by him." (R. 50:3.) While acknowledging that his discovery request did not concern evidence that the State intended to introduce at trial, Beyer responded that his right to inspect the computer stemmed from his due process rights to pretrial discovery and to present a defense and from his statutory discovery rights under Wis. Stat. § 971.23. (R. 54:1–4.)

At a non-evidentiary hearing, the State argued that Beyer was not entitled to discovery under section 971.23 because the State did not intend to introduce at trial the evidence that served as the basis for the search warrant. (R. 95:6–7.) The court agreed that Beyer had no right to discovery under section 971.23, but it suggested that Beyer could address his claims through cross-examination in a suppression motion. (R. 95:24.)

Beyer then moved to suppress, claiming that: "(1) the search warrant lacked probable cause in and of itself; (2) the agents relying on the search warrant knew that the search warrant lacked probable cause; and (3) the agents omitted and provided misleading information concerning its undercover investigative software (UIS)." (R. 57:1 (footnote omitted).) Beyer also renewed his request to "view the State's computer." (R. 57:12–13.)

Four witnesses testified at the hearing, including Agent Lenzner and Detective Sachtjen for the State, and Nicholas Schiavo and Juanluis Villegas, forensic computer examiners, for Beyer. (R. 66:2.)

Sachtjen testified that he relied on the information from Lenzner's investigation in his warrant application for Beyer's residence. (R. 66:4–5.) Sachtjen believed that the information that he provided in support of the warrant was truthful. (R. 66:6–7.)

Lenzner testified that he has "over 300 hours of investigative training in internet-crimes-against-children cases," including training "in the BitTorrent network." (R. 66:14.) Lenzner said that DOJ utilizes several programs to search for people sharing child pornography on the Internet, including Roundup. (R. 66:15.) Lenzner participated in a 20-hour Roundup training and now trains other officers on how to use the program. (R. 66:16.)

Lenzner said that around October 28, 2017, he received an alert from Roundup that someone in the Madison area was sharing child pornography. (R. 66:17.) He downloaded the subject file, which contained a "10 minute, 33 second video of an adult male attempting to vaginally and anally penetrate a prepubescent child." (R. 66:18–19.) After viewing the video, Lenzner sent an administrative subpoena to Charter for internet subscriber records. (R. 66:18–20.) Charter identified Beyer as the subscriber and provided his address. (R. 66:20.)

After Sachtjen executed the warrant, Lenzner learned that Beyer's devices did not contain the video that served as the basis for the warrant. (R. 66:22.) To the best of his knowledge, Lenzner said that the image "was probably deleted." (R. 66:23.) Lenzner explained that, with the passage of time, it becomes less likely that the image initially detected in the peer-to-peer investigation will be found in a subsequent search of the device. (R. 66:23.)

The circuit court interjected: "I thought in the affidavit for the search warrant you both attested to the fact that [suspects] don't delete these things, that they keep them, and that's why you had reason to believe that there would be this image and others on his computer." (R. 66:24.) Lenzner said that the "most common" offenders are "collectors," while others "view right away and delete it." (R. 66:24.) When asked why the affidavit did not state that some offenders swiftly delete the child pornography, Lenzner reiterated the "high likelihood" that an offender is a collector. (R. 66:25.)

On cross-examination, Lenzner agreed that when he spotted the child pornography on Beyer's computer, he did not know: (1) whether Beyer was a collector; (2) whether Beyer had viewed the video; or (3) how the video got on Beyer's computer. (R. 66:27–28.) Lenzner also said that he did not know the "specific person" that was sharing the child pornography, only the router's IP address. (R. 66:31.) He conceded that someone who did not reside at Beyer's residence could have accessed the Internet through the subject router. (R. 66:31.) Lenzner also confirmed that the two ways to prove that Beyer saw the video were to take his word or to examine his computer system. (R. 66:32.) Finally, Lenzner acknowledged that any computer program is subject to malware, but that he had never seen a case where a suspect claimed to possess child pornography because of malware. (R. 66:33–34.) He was also unaware of a time when malware infected DOJ's investigative software in this context. (R. 66:35–36.)

Defense witness Schiavo gave two explanations for why the video underlying the search warrant was not on any of Beyer's devices: "either it never was there, or there was some user intervention by somebody to delete the file and it was subsequently overwritten by new files." (R. 66:39.) When asked how to verify Lenzner's testimony that he saw the video, Schiavo responded, "Look at their system." (R. 66:40.)

Schiavo dedicated the remainder of his testimony to speculating benign reasons why child pornography was associated with Beyer's IP address. (R. 66:40–62.) For example, he testified that uTorrent—the program that Beyer used to file share—had a "flaw" that could be "exploited by any user with a web browser." (R. 66:33, 45.) He offered the possibility that law enforcement exploited Beyer's computer, i.e., planted the evidence, or another possibility that someone exploited a flaw in the program and downloaded the image to Beyer's computer. (R. 66:48, 50–51.) Schiavo agreed that it was possible that Beyer downloaded the file and then deleted it before his computer was searched. (R. 66:51.)

Finally, defense witness Villegas testified that he has participated in over 100 child pornography investigations. (R. 66:62–63.) He said that he "[v]ery rarely" sees the State charge the suspect with the child pornography that served as the basis for the search warrant. (R. 66:63–64.)

The circuit court denied Beyer's suppression motion. (R. 65.) It determined that the search warrant stated probable cause. (R. 66:79–83.) The court said it had no "evidence or any suggestion" that the State's witnesses were untruthful. (R. 66:82.) It found that Agent Lenzner "truthfully asserted that he's relied upon this type of evidentiary trail in the past and found it to be accurate and reliable." (R. 66:83.) And while the court expressed a preference for a search-warrant affidavit that was "more individually tailored" and contained a "more candid assessment[ ] of the reliability of this method of a search," it ultimately found no police "misconduct whatsoever." (R. 66:82–83.)

Beyer moved for reconsideration of the court's order. (R. 65; 67:1.) The court denied reconsideration. (R. 70.)

After the court denied Beyer's discovery and suppression motions, it found Beyer guilty at a trial on stipulated facts, and Beyer appealed. *State v. Beyer*, 2021 WI

59, ¶ 1, 397 Wis. 2d 616, 960 N.W.2d 408. Following this Court's certification, the supreme court decided the circuit court's procedure was invalid because a trial on stipulated facts and a stipulated finding of guilt are impermissible. *Id.* ¶¶ 1–2.

C. The court, as the factfinder, found Beyer guilty of possession of child pornography.

On remand, Beyer exercised his right to a trial, and the parties proceeded to trial on the image associated with Count 1 (the "Count 1 image"). (R. 1:9; 175:5–6.) The complaint described this image as that of a prepubescent female, whose vagina and breasts are exposed and showed no signs of development. (R. 1:9.) The parties agreed that the images associated with the previously dismissed counts, Counts 2 through 10, constituted admissible other acts. (R. 175:5–6.)

Lenzner testified that he subpoenaed Charter for records associated with an IP address after he detected, through undercover investigative software, that a video had been uploaded from that IP address. (R. 175:11–12, 17–19.) The National Center for Missing and Exploited Children had previously flagged the uploaded file. (R. 175:13.) Lenzner said that the software only identifies the router for the IP address and does not identify the device used to download or upload an image. (R. 175:13–14.) Charter records reflected that Beyer was the subscriber for an IP address at a Madison area apartment. (R. 175:11–12.)

Sachtjen testified about the execution of the search warrant at Beyer's residence, which Beyer occupied exclusively. (R. 175:49–50.) Sachtjen and Stacey Sadoff, a senior digital forensic examiner from the Wisconsin Department of Justice, conducted an on-scene preview of a hard drive seized from a computer tower inside the apartment. (R. 175:52.) For charging purposes, Sachtjen worked with Sadoff to identify ten images of child

pornography. (R. 175:53–54.) Sachtjen described the first image, describing it as that of a prepubescent female with an exposed vagina and breasts. (R. 175:55–56.) Through Sachtjen, the State offered, and the court received, ten images, which Sachtjen described as child pornography. (R. 159–168; 175:56–58.)

Sadoff, who was present during the warrant's execution, testified that she found child pornography while examining a hard drive. (R. 175:31, 34–36.) Sadoff and Sachtjen selected images from their search and placed them on a DVD. (R. 175:37.) Sachtjen documented the ten images in his report. (R. 174; 175:38.) As to the first image, Sadoff noted that the file was created on September 9, 2017, at 12:26 p.m. and that it was last accessed on that date at the same time. (R. 175:39–40.) Sadoff explained that "file created" refers to the date the file was saved on the computer, not the date it was taken, that "last accessed" refers to the date that the file was last accessed, and that "entry modified" refers to when the file was edited. (R. 175:39–40, 46.) Based on her observations, Sadoff said the Count 1 image had been opened but not edited. (R. 175:41.) Sadoff testified that the first six images, which had the name "Siberian mouse," were downloaded within 26 seconds of each other. (R. 175:45.) While the Count 1 image had the same date and time for the "file created," "last accessed," and "entry modified" fields, the other five images in the series had different "entry modified" dates and times. (R. 174:1–4.) Sadoff could not say whether Beyer knew those images were on his computer. (R. 175:45–46.) In addition to images found during the initial search, Sadoff said that she located several hundred image and video files with suspected child pornography. (R. 175:42.)

The court admitted Sachtjen's recorded interview with Beyer during Sachtjen's testimony. (R. 175:59, 62, 67.)[3] When Sachtjen asked Beyer if there was "stuff on [his] computer . . . that is gonna be a problem?", Beyer answered, "Yes." (R. 169:23.) Beyer began with adult pornography and started looking at child pornography "[d]eliberately," a few years ago. (R. 169:23–24.) Beyer explained that he received videos through "utorrent" of individuals who "clearly looked younger" than he expected. (R. 169:24.) Beyer said that there would be images and videos of children under age 18 on his computer. (R. 169:25.) Beyer said that there was a site with a list of torrents that he was working through. (R. 169:25–26.) Beyer said that he saved some of the files to a download folder on a second hard drive. (R. 169:26–27.)

Beyer told Sachtjen about his interest in masturbating children and that there were videos and images of children masturbating themselves or engaged in sex acts, including with adults, on his computer. (R. 169:27–28.) Beyer said that he is sexually aroused when watching the videos and images. (R. 169:28.) Beyer commented, "I suppose that brings up the question why did I keep doing it when I know it's illegal." (R. 169:29.) Beyer described his use of the "utorrent" file sharing system as "somewhat intermittent . . . because of the time it would take for anything to download." (R. 169:29.) Beyer said that he would download files, "usually . . . multiple files," for the purpose of viewing them later and that he was viewing child pornography on a weekly basis. (R. 169:29–30.) While Beyer said his interest was older, female teenagers, he

[3] The court received a USB drive which contains a recording of the interview and a transcript of the recording. (R. 169; 183.) The State played the recording beginning at 36 minutes and 2 seconds and ending at 58 minutes and 9 seconds. (R. 175:62, 68.) Because Beyer does not suggest that there are any material differences between the recording and the transcript, the State refers to the transcript for convenience.

had "younger stuff," but he did not keep infant or toddler material. (R. 169:31.) Beyer explained how file sharing with torrents work, "Someone has a file on their computer. . . . They set it up to allow other people to connect to the information and download that in small parts." (R. 169:33.)

After counsels' arguments, the court issued an oral ruling finding Beyer guilty of possession of child pornography. (R. 175:97.) In making its determination, the court concluded that the Count 1 image was child pornography. (R. 175:95.) "There is no way that anyone would be able to mistake that and think that it's a person who is 18 years old or older. Certainly[,] the image itself is graphic and of a sexualized manner." (R. 175:95.) The court explained why it determined that Beyer knew or reasonably should have known about the charged image even though no witness testified that Beyer looked at the image or that Beyer admitted looking at the image. (R. 175:95–96.) Beyer was the apartment's sole occupant, and the image was found on a hard drive removed from his computer. (R. 175:96.) There was no evidence that someone else placed the image there. (R. 175:96.) In addition, the court noted that other images were downloaded to that location and were viewed, including four other images of the same girl who appeared in the Count 1 image. (R. 175:96–97.)

Following its guilty verdict, the court sentenced Beyer to a four-year imprisonment term, consisting of a three-year initial confinement term and a one-year extended supervision term. (R. 175:99.) The court stayed execution of Beyer's sentencing pending appeal. (R. 175:99–100.)

ARGUMENT

I. The circuit court's denial of Beyer's request to access the agent's computer used in its investigation did not violate Beyer's due process rights.

A. Standard of Review

Whether the circuit court's discovery ruling denied Beyer his constitutional rights presents a question of constitutional fact. *See State v. Maday*, 179 Wis. 2d 346, 353, 507 N.W.2d 365 (Ct. App. 1993). This Court upholds the circuit court's findings of historical fact unless they are clearly erroneous but independently reviews the application of constitutional principles to those facts. *Id.*

B. The Due Process Clause does not confer a general constitutional right to discovery.

In contending that the circuit court erred in denying his discovery request, Beyer represents that he has a broad constitutional right to pre-trial discovery. (Beyer's Br. 32.)[4] Overwhelming case authority establishes that there is no general constitutional right to discovery in criminal cases—discovery is a statutory creature distinct from the State's constitutionally mandated duty to disclose exculpatory evidence to ensure a fair trial. Contrary to Beyer's contention, (Beyer's Br. 32), neither the constitutional right to present a defense, nor this Court's decision in *Maday,* alters this legal framework.[5]

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[4] The State refers to the electronic page numbers that the clerk assigned to Beyer's brief rather than Beyer's assigned page numbers.

[5] The circuit court rejected Beyer's argument that he had a statutory right under Wis. Stat. § 971.23 to inspect the State's computer. (R. 50:3–4; 95:24.) Beyer does not develop an argument

(Continued on next page)

1. A defendant has limited statutory and constitutional discovery rights.

"Historically, the right to discovery in criminal cases has been limited to that which is provided by statute." *State v. O'Brien*, 223 Wis. 2d 303, 319, 588 N.W.2d 8 (1999). Despite there being a constitutional right to a fair trial, "[t]here is no general constitutional right to discovery in a criminal case." *Weatherford v. Bursey*, 429 U.S. 545, 559–60 (1977); *accord Britton v. State*, 44 Wis. 2d 109, 118, 170 N.W.2d 785 (1969) ("Discovery has been left to rule-making power and has not been deemed a constitutional issue."). The United States Supreme Court has stated that "the Due Process clause has little to say regarding the amount of discovery which the parties must be afforded." *Wardius v. Oregon*, 412 U.S. 470, 474 (1973).

While "the Constitution does not require the prosecutor to share all useful information with the defendant," *United States v. Ruiz*, 536 U.S. 622, 629 (2002), the Due Process Clause *does* mandate the disclosure of evidence "that is both favorable to the accused and material to guilt or punishment." *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987); *accord Britton*, 44 Wis. 2d at 117–18 (distinguishing between discovery and the disclosure of exculpatory evidence on constitutional grounds). "Evidence that is favorable to the accused encompasses both exculpatory and impeachment evidence." *State v. Harris*, 2004 WI 64, ¶ 12, 272 Wis. 2d 80, 680 N.W.2d 737 (footnotes omitted). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). This right to favorable and material evidence

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that he had a valid statutory discovery claim. Therefore, State does not address it further, and neither should the Court. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

is "a right that the Constitution provides as part of its basic 'fair trial' guarantee." *Ruiz*, 536 U.S. at 628 (citation omitted).

Unless the government neglects to disclose favorable and material evidence, neither the United States Supreme Court nor the Wisconsin Supreme Court have any constitutional concerns. *See, e.g.*, *Weatherford*, 429 U.S. at 559–60 (finding no constitutional violation where the government withheld the name of a witness who testified unfavorably to the defendant at trial); *Dowd v. City of Richmond*, 137 Wis. 2d 539, 559–60, 405 N.W.2d 66 (1987) (finding no constitutional violation where the government withheld non-exculpatory information from its files); *Britton*, 44 Wis. 2d at 117–19 (finding no constitutional violation where the State declined the defendant's postconviction request to examine its files for useful information); *State v. Miller*, 35 Wis. 2d 454, 478–79, 151 N.W.2d 157 (1967) (same as *Dowd*).

2. The right to present a defense does not create a general discovery right.

"[T]he right to present a complete defense has *never* been interpreted to include a general right to access (or discover) information in a criminal case." *State v. Lynch*, 2016 WI 66, ¶ 46, 371 Wis. 2d 1, 885 N.W.2d 89 (lead opinion). Like the right to receive exculpatory evidence from the government, the right to present a defense has been recognized as a basic element of a fair trial. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986). The seven times that the Supreme Court has analyzed the right to present a defense proves this point. *See* Colin Miller, *Dismissed with Prejudice: Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to Present a Defense*, 61 Baylor L. Rev. 872, 899 (2009). In each case, the Supreme Court examined an evidentiary

rule that deprived the defendant of the opportunity to present material and favorable evidence *at trial*. *Id.* at 899–916.

That the right to present a defense is a trial-related right with no bearing on a defendant's right to discovery in a criminal case is therefore clear. *See Lynch*, 371 Wis. 2d 1, ¶ 46. The Supreme Court's so-called "access to evidence" cases aimed at safeguarding the right to present a defense are limited to enforcing the government's constitutionally required duty to disclose *exculpatory* evidence. *See California v. Trombetta*, 467 U.S. 479, 485 (1984). These cases do not impose a general obligation on the government to provide all useful information to the defense. *See id.*

3. A defendant's right to discovery under *Maday* is limited.

The Wisconsin Supreme Court has recognized that there is no general constitutional right to discovery in a criminal case, *see Miller*, 35 Wis. 2d at 474, and some of its members believe that "a defendant is entitled to access information only to the extent outlined in Wis. Stat. § 971.23," *Lynch*, 371 Wis. 2d 1, ¶ 47. Nevertheless, Beyer interprets *Maday* as affording criminal defendants broad discovery rights in the name of due process. (Beyer's Br. 32.) He reads *Maday* too broadly.

Maday addressed a narrow set of circumstances involving *Jensen* evidence.[6] Before trial, the State retained five experts to testify that the behaviors of the sexual abuse victims were consistent with the behaviors of sexual abuse victims generally. *Maday*, 179 Wis. 2d at 350. Wanting substantive evidence to rebut the State's *Jensen* evidence, Maday moved for an order requiring the victims to submit to

[6] Under *State v. Jensen*, 147 Wis. 2d 240, 257, 432 N.W.2d 913 (1988), an expert may testify about the consistency of a complainant's behavior with the behavior of similar crime victims.

psychological examinations by his experts. *Id.* The court denied Maday's motion. *Id.* On appeal, noting the importance "of a level playing field" *at trial*, this Court held: "Fundamental fairness requires that Maday be given the opportunity to present relevant evidence to counter [the State's *Jensen* evidence]." *Id.* at 357.

Maday speaks more "to the balance of forces between the accused and his accuser" at trial, not the "amount of discovery which the parties must be afforded." *Wardius*, 412 U.S. at 474. Nevertheless, this Court broadly pronounced that "pretrial discovery is a fundamental due process right." *Maday*, 179 Wis. 2d at 354. *Contra Ritchie*, 480 U.S. at 59–60 (1987); *Weatherford*, 429 U.S. at 559; *Wardius*, 412 U.S. at 474; *Britton*, 44 Wis. 2d at 118; *Miller*, 35 Wis. 2d at 474.[7] At other times, however, this Court spoke in terms of "constitutional rights to a fair trial." *Maday*, 179 Wis. 2d at 361.

Regardless of the constitutional basis for the court's decision in *Maday*, two things are clear. First, it mattered that the defendant's claim centered on information that he wanted to present *at trial*. *Maday*, 179 Wis. 2d at 353–62. Second, the court of appeals has since stressed that its decision "in *Maday* is strictly limited to situations in which

[7] This Court's characterization of "pretrial discovery" as a "fundamental due process right" is not only inconsistent with controlling precedent, it rests on an unsound foundation. *See Maday*, 179 Wis. 2d at 354 (citing *Rogers v. State*, 93 Wis. 2d 682, 692–93, 287 N.W.2d 774 (1980); *Milenkovic v. State*, 86 Wis. 2d 272, 286, 272 N.W.2d 320 (Ct. App. 1978)). Neither *Rogers* nor *Milenkovic* supports this proposition. In *Rogers*, the issue was whether the trial court improperly limited the defendant's cross-examination of a witness at trial. *See Rogers*, 93 Wis. 2d at 692–93. In *Milenkovic*, the defendant challenged the trial court's exclusion of evidence of the complainant's prior sexual conduct with third persons and whether the complainant had a venereal disease. *See Milenkovic*, 86 Wis. 2d at 276, 286–87.

the prosecution retains experts in anticipation of trial in order to present *Jensen* evidence." *State v. David J.K.*, 190 Wis. 2d 726, 735, 528 N.W.2d 434 (Ct. App. 1994). Attempts to broaden *Maday*'s scope have failed. *See id.*

C. The circuit court's order denying discovery did not violate Beyer's constitutional rights.

Because there is no general constitutional right to discovery in a criminal case, and because the State did not violate its duty to disclose exculpatory evidence, the circuit court did not err in denying Beyer's discovery request to access the investigator's computer.

Beyer wanted to search the computer because, as the circuit court explained, "[h]e had hoped that the knowledge gained by examining the computer might be useful to him in challenging the search warrant." (R. 70:1; 95:3.) Beyer believes that due process requires as much, (R. 54:1–3), but Supreme Court precedent on this federal constitutional issue establishes that he has "no constitutional right to conduct his own search of the State's files to argue relevance." *Ritchie*, 480 U.S. at 59. Wisconsin law similarly prohibits criminal defendants from examining the State's files for helpful information. *See Britton*, 44 Wis. 2d at 117–19.

But even if Beyer could establish that the information he seeks is useful to his defense, that would not change the analysis. *See Ruiz*, 536 U.S. at 629. Why? Because Beyer is not seeking exculpatory material—the only area of constitutionally guaranteed access to evidence. *See Trombetta*, 467 U.S. at 485. He is not even seeking evidence for use at trial. That Beyer seeks non-exculpatory information for use at a pre-trial proceeding further weakens his novel legal argument: not only does his position find no support in Supreme Court precedent, it does not fit within the special circumstances where this Court has allowed access to information in the name of due process. *See Maday*, 179

Wis. 2d at 353–62. Even if the Wisconsin Constitution afforded greater protection in this context than does the U.S. Constitution (it does not), there still is no precedent showing that Beyer is entitled to relief. More broadly, Beyer's position conflicts with the purpose of pretrial discovery in Wisconsin: "assur[ing] fairness at a criminal trial." *State v. Schaefer*, 2008 WI 25, ¶ 23, 308 Wis. 2d 279, 746 N.W.2d 457.

Because there is no precedent supporting Beyer's discovery request, the circuit court did not err in denying him relief.

Beyer's contrary position is meritless. While he roots his argument in the federal Due Process Clause, (Beyer's Br. 32), he does not address Supreme Court precedent contradicting his claim. For example, he fails to acknowledge that there is no general constitutional right to discovery in a criminal case. (Beyer's Br. 32–37.) Although Beyer references "constitutionally guaranteed access to evidence," (Beyer's Br. 32 (citation omitted)), he does not mention that such access has been limited to exculpatory evidence, *see Trombetta*, 467 U.S. at 485. Beyer also cites his constitutional right to present a defense but does not discuss the cases where the Supreme Court applied that right. (Beyer's Br. 32–37.) He overlooks that each case addressed an evidentiary rule that deprived the defendant of the opportunity to present at trial material and favorable evidence that the defendant already had. *See* Miller, *supra* at 899–916.

Beyer supports his argument with a non-binding, unpublished, and uncitable decision from this Court, along with three non-binding federal decisions. (Beyer's Br. 33, 35–39.) As to the former, the rules of appellate procedure do not allow the parties to address the case here. Wis. Stat. § (Rule) 809.23(3)(b). And the latter have nothing to do with constitutional rights.

Rather, each of the cited federal cases addresses Fed. R. Crim. P. 16 (Rule 16), under which "a criminal defendant has a right to inspect all documents, data, or tangible items within the government's 'possession, custody, or control' that are 'material to preparing the defense.'" *United States v. Budziak*, 697 F.3d 1105, 1111 (9th Cir. 2012) (citing Fed. R. Crim. P. 16(a)(1)(E)); *see also United States v. Gonzales*, No. CR-17-01311-001-PHX-DGC, 2019 WL 669813, at *2 (D. Ariz. Feb. 19, 2019); *United States v. Owen*, No. 18-CR-157, 2019 WL 6896144, at *3 (E.D. Wis. Dec. 18, 2019). Since Beyer does not seek discovery under a Wisconsin statutory equivalent of Rule 16, and because federal court rules do not apply in state courts, these cases are inapposite.

By relying on the looser "materiality" framework of the federal cases, (Beyer's Br. 35–39), Beyer seeks not only to apply inapposite law but to circumvent Supreme Court precedent as well. To compel discovery under Rule 16, a defendant simply needs to make a threshold showing that evidence "is helpful to the development of a possible defense." *Budziak*, 697 F.3d at 1111. But the Constitution does not require discovery of "helpful" evidence. *See Ruiz*, 536 U.S. at 623, 630. Rather, it compels the government to disclose evidence that is both *favorable* to the accused and *material* to guilt or punishment—a standard that is indisputably higher than Rule 16's. *Gonzales*, 2019 WL 669813, *7.

Beyer has not demonstrated that Rule 16's "material to preparing the defense" standard extends to Wisconsin prosecutions, either because it is constitutionally required or because section 971.23 provides a statutory equivalent. But even if it did, Beyer could not prevail under his case's facts. Beyer's position has been that discovery was necessary to determine whether Lenzner either lied about viewing the video that served as the basis for the search warrant or misrepresented the reliability of the undercover investigative software at issue. (R. 50:3; 54:2–3; 66:80; 95:5–6.) But

Lenzner testified to the contrary, including that he watched the video uploaded from Beyer's IP address and that his software maintains a file log regarding the images and videos he reviews. (R. 66:17–19, 32.) Further, although possible, he has never had a case where somebody put images on another torrent user's computer. (R. 66:33–34.) And while acknowledging that the torrent network is subject to malware, he has never had a case where he downloaded malware from a torrent network. (R. 66:35–36.) Further, defense expert Schiavo's testimony was speculative at best, focused on the "different possibilities" as to how Lenzner could have downloaded the video file that was not found during the subsequent search of Beyer's computer. (R. 66:39–52.) When pressed on the possibility that malware may have exploited Beyer's computer and manipulated files, Schiavo could provide no evidence for that. (R. 66:47–48, 51.)

Here, where the court found the officers credible and found no evidence of misconduct, (R. 66:82–83), and where the defense testimony was speculative at best, Beyer cannot meet the materiality standard for which he advocates.

II. The court did not err when it denied Beyer's suppression motion on Fourth Amendment grounds.

A. Standard of Review

This Court reviews "a warrant-issuing magistrate's determination of whether the affidavit in support of the order was sufficient to show probable cause with 'great deference.'" *State v. Tate*, 2014 WI 89, ¶ 14, 357 Wis. 2d 172, 849 N.W.2d 798 (citation omitted). This Court reviews do novo whether Beyer was entitled to a *Franks/Mann* hearing. *State v. Manuel*, 213 Wis. 2d 308, 315, 570 N.W.2d 601 (Ct. App. 1997). If he was, the question is whether he proved a violation by a preponderance of the evidence. *Id.* at 313.

B. Legal Standards Applicable to Probable Cause Determinations

1. Beyer has the burden of showing that the evidence offered in support of the warrant was clearly insufficient.

The United States and Wisconsin Constitutions protect people from unreasonable searches and establish the requirements for the issuance of a search warrant. *Tate*, 357 Wis. 2d 172, ¶ 27. Among these requirements, there must be "probable cause to believe that evidence is located in a particular place." *State v. Ward*, 2000 WI 3, ¶ 26, 231 Wis. 2d 723, 604 N.W.2d 517.

Courts determine whether probable cause exists based on the totality of the circumstances. *Ward*, 231 Wis. 2d 723, ¶ 26. Probable cause exists if there is "'fair probability' that contraband or evidence of a crime will be found in a particular place." *State v. Tullberg*, 2014 WI 134, ¶ 33, 359 Wis. 2d 421, 857 N.W.2d 120 (citations omitted). "Probable cause [for a search warrant] is not a technical, legalistic concept[,] but a flexible, common-sense measure of the plausibility of particular conclusions about human behavior." *State v. Kerr*, 181 Wis. 2d 372, 379, 511 N.W.2d 586 (1994) (citation omitted). The test is not whether the inference that the issuing magistrate drew is the only reasonable inference, but "whether the inference drawn is a reasonable one." *State v. Romero*, 2009 WI 32, ¶ 41, 317 Wis. 2d 12, 765 N.W.2d 756 (citation omitted). Thus, a "reasonable inference support[ing] the probable cause determination" suffices—it does not matter that a competing inference of lawful conduct exists. *State v. Dunn*, 121 Wis. 2d 389, 398, 359 N.W.2d 151 (1984).

"The person challenging the warrant bears the burden of demonstrating that the evidence before the warrant-issuing judge was clearly insufficient." *State v. DeSmidt*, 155 Wis. 2d 119, 132, 454 N.W.2d 780 (1990).

2. Beyer must show a *Franks/Mann* violation by a preponderance of the evidence.

Generally, this Court presumes the validity of an affidavit supporting a search warrant. *See State v. Anderson*, 138 Wis. 2d 451, 463, 406 N.W.2d 398 (1987). That presumption is hard to overcome.

A circuit court is required to conduct a hearing when a "defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included . . . in the warrant affidavit, and if the allegedly false statement [was] necessary to the finding of probable cause." *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978). In *State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985), the Wisconsin Supreme Court extended the *Franks* rule to "omissions from a warrant affidavit if the omissions are the equivalent of deliberate falsehoods or reckless disregard for the truth." *State v. Jones*, 2002 WI App 196, ¶ 25, 257 Wis. 2d 319, 651 N.W.2d 305. If the defendant receives a hearing, he must prove his claimed violation by a preponderance of the evidence. *Franks*, 438 U.S. at 155–56. Even if the defendant establishes a *Franks* violation, the seizure of evidence under the warrant will still be valid if, upon excision of the offending statement or inclusion of the omitted statement, the affidavit still establishes probable cause. *Franks*, 438 U.S. at 156.

C. Detective Sachtjen's search warrant affidavit demonstrates probable cause.

To establish probable cause, Sachtjen's affidavit had to show that Beyer knowingly possessed or accessed "in any way with the intent to view" a recording of a child engaged in sexually explicit conduct. Wis. Stat. § 948.12(1m); Wis. JI-Criminal 2146A (2020). The question is whether the search-warrant affidavit contains information "sufficient for a

reasonable person to logically infer that evidence would be found" at Beyer's home. *Ward*, 231 Wis. 2d 723, ¶ 27. The answer is yes.

Detective Sachtjen's affidavit states that Agent Lenzner found child pornography in a publicly shared file named "Sarah Footjob" from an IP address assigned to Beyer. (R. 55:6, 8, 15, 22–25.) These facts, coupled with the information about the peer-to-peer network and law enforcement's experience therewith, (R. 55:7–15), created a reasonable inference that Beyer knowingly possessed child pornography, *see* Wis. JI-Criminal 2146A (2020); *State v. Gralinski*, 2007 WI App 233, ¶ 24, 306 Wis. 2d 101, 743 N.W.2d 448 (holding that purchase of membership to websites containing child pornography supported inference of knowing possession); *United States v. Raymonda*, 780 F.3d 105, 115–16 (2d Cir. 2015) (discussing circumstances suggesting willful and deliberate access to child pornography).

Further, according to the search-warrant affidavit, police corroborated that Beyer lived at the physical address associated with his IP address. (R. 55:16.) The affidavit also provides information regarding the capabilities of computers and the proclivities of those persons interested in child pornography. For example, it states that "data related to the possession of a file can be recovered for an extended period of time after 'deletion'" of the file, "even months or years later." (R. 55:16.) And according to "historic law enforcement experience[,] individuals who have an interest in child pornography . . . tend to retain any images or videos they obtain that depict such activity" such that "it can reasonably be expected that similar evidence of that sexual interest in children . . . will be found" in their possession. (R. 55:17.) These facts reveal "a fair probability" that police would find contraband or evidence of a crime in Beyer's residence, computers, or digital storage devices. *See Gralinski*, 306 Wis. 2d 101, ¶ 31 (rejecting probable cause challenge on

staleness grounds because deleted files can remain on hard drive and "the proclivity of pedophiles to retain this . . . information"); *Raymonda*, 780 F.3d at 115–16; *United States v. Seiver*, 692 F.3d 774, 777 (7th Cir. 2012) (discussing significance of the fact that computer files, when deleted, are normally recoverable).

Beyer cannot show that the warrant-issuing judge clearly lacked probable cause. The first half of Beyer's argument boils down to a disagreement with the well-established principle that reasonable inferences suffice to support the probable cause determination. (Beyer's Br. 41.) For example, he complains that "[t]here are no search terms noted in the warrant application which would suggest that Beyer was actively seeking to download child pornography onto his device." (Beyer's Br. 41)

None of Beyer's complaints matter. What matters is law enforcement's direct detection of child pornography in a file named "Sarah Footjob" on a device tied to Beyer through an IP address, and the reasonable inferences that flow from those facts based on additional information in the search-warrant affidavit. *Cf. Gralinski*, 306 Wis. 2d 101, ¶¶ 20, 30–31. For example, the affidavit explained that an individual must obtain special software to participate in a file-sharing network that is often used to facilitate the possession of child pornography. (R. 55:7–11.) It also described how the file-sharing network works: an individual conducts text-based searches for files of interest. (R. 55:8.) Based on these facts, the reviewing magistrate reasonably infered that Beyer's conduct met the elements for possession of child pornography.

The remainder of Beyer's position amounts to criticism that Agent Lenzner did not pin him with *more* child pornography before initiating the search-warrant process. (Beyer's Br. 43–44.) Beyer believes that, absent additional evidence, he cannot be viewed as a collector of child pornography. (Beyer's Br. 43–45.) It follows, he reasons, that

the tendencies of child-pornography collectors should not factor into whether there was probable cause to believe that evidence of a crime would be found at his house some 40 days after Lenzner's initial detection. (Beyer's Br. 43–45.) This argument is a distraction given the information in the search-warrant affidavit regarding a computer's ability to retain a file even after its deletion. (R. 55:16.) This fact alone supports probable cause to believe that evidence of a crime would be found at Beyer's residence. *See Seiver*, 692 F.3d at 775–77 ("But seven months [between a upload and a computer search] is too short a period to reduce the probability that a computer search will be fruitful to a level at which probable cause has evaporated.").

Regardless, Beyer's argument fails because, as discussed above, the facts in the search-warrant affidavit support a reasonable inference that Beyer willfully and deliberately accessed child pornography. *See Raymonda*, 780 F.3d at 114–16. Beyer's claim that there are no facts supporting a reasonable belief that he is a collector is false: he did not simply need to "click the mouse" to obtain child pornography, and he made the child pornography available to others, as evidenced by Lenzner's ability to obtain the video file through a peer-to-peer network from a device connected to the IP address associated with Beyer's residence. (Beyer's Br. 43; R. 55:15, 24.)

Because the warrant's supporting affidavit states probable cause, this Court need not address Beyer's anticipatory argument that the good-faith exception to the exclusionary rule should not apply. (Beyer's Br. 41–43.) But if this Court determines that the affidavit did not state probable cause, remand is necessary to assess whether the good-faith exception applies. *See State v. Scull*, 2015 WI 22, ¶¶ 31–37, 361 Wis. 2d 288, 862 N.W.2d 562 (discussing the good-faith exception). Remand would be necessary because, once the circuit court upheld the warrant's validity, it had no reason to

decide whether the officers acted in good faith reliance on the warrant's validity. In cases where this Court has disagreed with the circuit court and determined that a Fourth Amendment violation has occurred, it has remanded the matter to the circuit court to determine whether an exception to the exclusionary rule applies. *See, e.g.*, *State v. Anker*, 2014 WI App 107, ¶ 27, 357 Wis. 2d 565, 855 N.W.2d 483 (remanding to conduct an evidentiary hearing to determine whether the independent source or inevitable discovery exceptions applied); *State v. Marquardt*, 2001 WI App 219, ¶¶ 22–23, 53, 247 Wis. 2d 765, 635 N.W.2d 188 (remanding for a hearing to determine whether the good-faith exception applied).

For the above reasons, this Court should hold that the search warrant affidavit stated probable cause.

D. Beyer did not prove a *Franks/Mann* violation.

Beyer's *Franks/Mann* challenge has changed over time. (R. 57:9–12; Beyer's Br. 47–48.) He now appears to narrow it to "misrepresentations about the expected tendencies of offenders," a "misrepresentation that there was reason to believe that Beyer fell into a certain category [sic] offender," and an "omission of critical information about the preeminence of temporal considerations in determining the likelihood of recovering detected contraband." (Beyer's Br. 49.)

Assuming that Beyer was entitled to a *Franks/Mann* hearing, he has not proved his claims.[8] Beyer did not establish by a preponderance of the evidence that the search-warrant

[8] That Beyer's current position relies on testimony adduced at the suppression hearing suggests that he did not make the substantial preliminary showing necessary to obtain a *Franks/Mann* hearing. (Beyer's Br. 47, 50); *see State v. Anderson*, 138 Wis. 2d 451, 462, 406 N.W.2d 398 (1987).

affidavit contained false statements that were "made either intentionally, or with a reckless disregard for the truth." *Anderson*, 138 Wis. 2d at 463. Contrary to Beyer's unsupported contention, Agent Lenzner did not admit at the evidentiary hearing that "a significant percentage of offenders were actually not collectors." (Beyer's Br. 47.) Rather, consistent with the information in the search-warrant affidavit, he testified about the "high likelihood" that an offender is a collector. (R. 66:25.) So, there is no false statement whatsoever in this regard, let alone one made intentionally or with reckless disregard for the truth. Moreover, given the high likelihood that an offender *is* a collector, Beyer did not prove a "misrepresentation that there was reason to believe that [he] fell into a certain category [sic] offender." (Beyer's Br. 49.) And Beyer neither proved that the search-warrant affidavit lacks probable cause without these so-called misrepresentations, nor does he offer anything other than conclusory statements in this regard on appeal. (Beyer's Br. 48–50.)

Finally, Beyer has not proved a critical omission from the search-warrant affidavit. (Beyer's Br. 48.) He appears to argue that the affidavit should have incorporated Agent Lenzner's testimony that a lag in executing the search warrant decreases the likelihood that police will find the suspect file. (Beyer's Br. 47–48.) This information was not "critical for a fair decision" on probable cause because there was still a "fair probability" that the evidence, even if deleted, would exist "despite the passage of [a] significant period[ ] of time." (R. 55:17); *Mann*, 123 Wis. 2d at 388; *Gralinski*, 306 Wis. 2d 101, ¶ 31. And even if enough time had passed such that there was no longer a fair probability of finding the suspect file, the very fact that any file containing child pornography had been uploaded via a torrent program from Beyer's residence meant there was a fair probability that other files containing child pornography would be found on a

device at that residence because most sharers of this kind of material are collectors. Further, Beyer offers only conclusory allegations that the inclusion of this omitted information would have prevented a finding of probable cause. (Beyer's Br. 48–49); *see Mann*, 123 Wis. 2d at 388–89.

Beyer had the opportunity to prove a *Franks/Mann* violation at an evidentiary hearing. He did not meet his burden. In rejecting Beyer's probable cause challenge, the court found the affiant, Detective Sachtjen reasonably relied on Agent Lenzner's representation, and the court concluded that Lenzner "has truthfully asserted that he's relied upon this type of evidentiary trail in the past and found it to be accurate and reliable." (R. 66:82–83.) Beyer did not prove that Lenzner's representation about collectors was untrue, but even if he had, Sachtjen's affidavit would still state probable cause based Lenzner's ability to obtain the video file through peer-to-peer file sharing software associated with Beyer's IP address and the continued existence of deleted data. *See Franks*, 438 U.S. at 156.

For these reasons, the circuit court did not err in denying Beyer's *Franks/Mann* challenge.

III. Sufficient evidence supported Beyer's conviction for possession of child pornography.

A. Standard of Review

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. In reviewing the sufficiency of the evidence, this Court gives great deference to the factfinder's determinations, examining the record to find facts that uphold its guilty verdict. *State v. Hayes*, 2004 WI 80, ¶ 57, 273 Wis. 2d 1, 681 N.W.2d 203.

B. Beyer bears a heavy burden in challenging the sufficiency of the evidence.

"[A] defendant challenging the sufficiency of the evidence bears a heavy burden to show the evidence could not reasonably have supported a finding of guilt." *State v. Beamon*, 2013 WI 47, ¶ 21, 347 Wis. 2d 559, 830 N.W.2d 681. This Court affirms the verdict if it is based on a "reasonable inference drawn from the evidence." *Smith*, 342 Wis. 2d 710, ¶ 33. To this end, it considers "the totality of the evidence when conducting a sufficiency of the evidence review." *State v. Coughlin*, 2022 WI 43, ¶ 25, 402 Wis. 2d 107, 975 N.W.2d 179.

Because this Court reviews the evidence in the light most favorable to the State and conviction, it will not substitute its judgment for that of the jury, "unless the evidence . . . is so lacking in probative value and force that no [jury], acting reasonably, 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, including circumstantial evidence, this Court accepts the inference drawn by the factfinder that supports the verdict "unless the evidence on which that inference is based is incredible as a matter of law." *Id*. at 506–07.

C. The State had to prove that Beyer knowingly possessed, or accessed with intent to view, child pornography.

Wisconsin Stat. § 948.12(1m)[9] defines the crime of possession of child pornography. Section (1m) provides two alternative means to commit the crime of possession of child pornography: (1) "possesses"; and (2) "accesses in any way with the intent to view." *Id*. Subsection (1m) lists terms that specify the offender's state of mind, including "with the intent," "knows," or "reasonably should know." As used in this section, "'[w]ith intent to' . . . means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." Wis. Stat. § 939.23(4). And "'[k]now' requires only that the actor believes that the specified fact exists." Wis. Stat. § 939.23(2).

Wisconsin JI-Criminal 2146A (2020) sets forth four elements for possession of child pornography. First, Beyer

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[9] Wisconsin Stat. § 948.12(1m) (2017–18) provides:

> (1m) Whoever possesses, *or accesses in any way with the intent to view*, any undeveloped film, photographic negative, photograph, motion picture, videotape, or other recording of a child engaged in sexually explicit conduct under all of the following circumstances may be penalized under sub. (3):
>
> (a) The person knows that he or she possesses *or has accessed the material*.
>
> (b) The person knows, or reasonably should know, that the material that is possessed *or accessed* contains depictions of sexually explicit conduct.
>
> (c) The person knows or reasonably should know that the child depicted in the material who is engaged in sexually explicit conduct has not attained the age of 18 years.

knowingly possessed *or* "accessed a recording in any way with intent to view it." Second, "[t]he recording showed a child engaged in sexually explicit conduct." *Id*. Third, Beyer "knew or reasonably should have known that the recording contained depictions of a person engaged in [sexually explicit conduct]." *Id*. Fourth, Beyer "knew or reasonably should have known that the person" shown in the recording or depicted in the material "was under the age of 18 years." *Id*. (footnote omitted).

This Court has previously rejected sufficiency challenges to convictions under section 948.12(1m) based on a defendant's claim that he or she did not possess the images at issue. In *State v. Lindgren*, 2004 WI App 159, ¶ 23, 275 Wis. 2d 851, 687 N.W.2d 60, Lindgren argued that the images found on his computer were not in his possession because there was no evidence that he saved it to his computer. In rejecting Lindgren's sufficiency challenge, this Court relied on *United States v. Tucker*, 305 F.3d 1193 (10th Cir. 2002), where the Tenth Circuit found that the evidence was sufficient to show "possession" where images were "cached" on the hard drive and there was evidence that the defendant knew that would happen when he accessed pornographic material. *Lindgren*, 275 Wis. 2d 851, ¶¶ 25–26. This Court therefore upheld the guilty verdict based on evidence that Lindgren "repeatedly visited child pornography Web sites, clicked on thumbnail images to create larger pictures for viewing, accessed five images twice, and saved at least one image to his personal folder." *Id*. ¶ 27.

In *State v. Mercer*, 2010 WI App 47, ¶ 1, 324 Wis. 2d 506, 782 N.W.2d 125, this Court again addressed what constitutes "knowing possession" of child pornography. This Court framed the issue as "whether individuals who purposely view digital images of child pornography on the Internet, even though the images are not found in the person's computer hard drive, nonetheless *knowingly possess* those

images." *Id.* This Court concluded that "an individual knowingly possesses child pornography when he or she affirmatively pulls up images of child pornography on the Internet and views those images knowing that they contain child pornography." *Id.* ¶ 31. In rejecting Mercer's sufficiency challenge, this Court considered his pattern of repeatedly searching for and viewing child pornography on his computer, along with evidence that he had deleted child pornography files from his hard drive. *Id.* ¶ 33.

After this Court decided *Lindgren* and *Mercer*, the Legislature amended section 948.12(1m) to add the phrase "or accesses in any way with the intent to view" after "[w]hoever possesses." 2011 Wis. Act 271. No Wisconsin court has interpreted this "access-with-intent" language, which the Legislature adopted after Congress amended the federal child pornography possession law, 18 U.S.C. § 2252A(a)(5)(B), to add similar language: "knowingly accesses with intent to view." *United States v. Ramos*, 685 F.3d 120, 130 n.7 (2d Cir. 2012) (discussing the amendment's origins in the Enhancing the Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110–358, § 203(b), 122 Stat. 4001, 4003 (2008)).

Interpreting the "accesses with intent" amendment, the Sixth Circuit explained, "The access-with-intent offense is complete the moment that the elements of access and intent coincide. Thus, even if the person *never viewed* illegal child pornography, knowingly accessing a child-pornography website with intent to view illegal materials is itself a criminal act." *United States v. Tagg*, 886 F.3d 579, 587 (6th Cir. 2018) (emphasis added) (citation omitted). Said another way, "'access-with-intent' liability is triggered when a person 'intentionally searche[s] for images of child pornography, f[inds] them,' but then stops short of viewing the images themselves." *Id.* at 588 (alterations in original) (quoting *Ramos*, 685 F.3d at 132). Access-with-intent liability "mirrors the long-standing doctrine of attempt, which imposes liability

on anyone who intends to do an illegal act and takes a substantial step toward that goal." *Id.*; *see also United States v. Rivenbark*, 748 F. App'x 948, 957 (11th Cir. 2018) (the government does not have to show that a person viewed the image to prove that a person accessed images with intent to view them).

D. Beyer did not meet his heavy burden of demonstrating that the evidence was insufficient to support the guilty verdict.

Beyer fails to meet his heavy burden of demonstrating that the evidence was insufficient to support his conviction for possession of child pornography. Noting that the Count 1 image's date and time for the "file created," "last accessed," and "entry modified" were identical, Beyer contends that there was no proof that Beyer ever saw that image and, therefore, the State did not prove that he "knowingly possessed the specific image." (Beyer's Br. 51–53.) Contrary to this argument, the evidence shows that Beyer both *knowingly* possessed the image and, alternatively, *accessed it with intent to view* it.

Beyer reasonably does not dispute the factfinder's determination that the Count 1 image constituted child pornography. (R. 175:95.) The Count 1 image, described in the report, testimony, and arguments as that of a prepubescent female with exposed vagina and undeveloped breasts depicts sexually explicit conduct.[10] (R. 174:2; 175:55, 93.) Referencing both the Count 1 image and other images of "the same young girl," the State described the child as "engaged in masturbation," a characterization which Beyer did not challenge. (R. 175:93–95.)

[10] Wisconsin Stat. § 948.01(7) defines "[s]exually explicit conduct," which includes "masturbation" and the "[l]ewd exhibition of intimate parts."

Likewise, while disputing that he knowingly possessed the Count 1 image, Beyer concedes that he admitted downloading child pornography through a file sharing network and that he possessed child pornography on his computer. (Beyer's Br. 51–53.) Indeed, Beyer admitted to Sachtjen that he downloaded files with a "utorrent" file sharing system, that he had on his computer images and videos of children engaged in masturbation and sexual activity with others, and that he viewed child pornography on a weekly basis. (R. 169:24–29.) Further, in addition to the nine additional images which were received as exhibits and formed the basis for the dismissed counts, Sadoff testified that she observed several hundred other image and video files with suspected child pornography. (R. 175:42, 57–58.)

Contrary to Beyer's argument, the factfinder could reasonably infer from the evidence that Beyer knowingly possessed the Count 1 image, which depicted a prepubescent female in a sexually explicit manner. True, the State presented no direct evidence—either an eyewitness or Beyer's admission that he viewed the Count 1 image. But even without direct evidence, the circumstantial evidence that Beyer knowingly possessed the Count 1 image was particularly strong. *See Poellinger*, 153 Wis. 2d at 501–02 ("[C]ircumstantial evidence is oftentimes stronger and more satisfactory than direct evidence.").

Consistent with Lenzner's testimony that a suspect file had been uploaded from an IP address associated with Beyer's residence, Beyer agreed that he used "the utorrent file sharing system to look at child pornography." (R. 169:29; 175:13, 18.) Beyer said that he worked through a list of torrents on a site, that he would download it, that he kept some but not most of the videos and images that he downloaded, and that it was saved to a second hard drive, specifically to a folder with a pathname "stuff, and then downloads, and then new folder." (R. 169:25–27.)

Investigators located the Count 1 image in a folder that included "\stuff\Downloads\new folder\pictures\." (R. 170:1; 175:70.) Consistent with his interest in material involving masturbating children, the Count 1 image depicts a child who is masturbating. (R. 169:27; 175:93.) The court observed that the girl in the Count 1 image appeared in four additional images. (R. 170:1–3; 175:96–97.)

The evidence shows beyond a reasonable doubt that Beyer deliberately acted to retain the Count 1 image. He admitted looking for child pornography, with an interest in images and videos of children masturbating. (R. 169:27–28.) While he deleted files of child pornography as he went through it, he identified the place on his device where the files were saved. (R. 169:25–26, 31.) The Count 1 image, which depicted the kinds of things he was interested in, was found in a place where Beyer said the files were downloaded, and that folder included other images of the same child. (R. 170:1; 175:70.) At an absolute minimum, this shows beyond a reasonable doubt that Beyer knowingly possessed the Count 1 image, even if he never opened it. Further, based on his interest in material with masturbating children and the presence of other similar images in the place where investigators located the Count 1 image, a factfinder could reasonably conclude that Beyer believed that the Count 1 image file depicted a female child.

Beyer's argument that the State did not prove knowing possession of the Count 1 image fails for another reason. (Beyer's Br. 52–53.) Beyer forgets section 948.12(1m) also makes him liable if he accessed the Count 1 image "with the intent to view" it. The State specifically alleged in the complaint and information that Beyer committed Count 1 by accessing the image with intent to view it. (R. 1:1; 12:1.)

By alleging that Beyer accessed "with intent to" view the Count 1 image, the State only had to show that Beyer had "a purpose to do the thing or cause the result specified, or

[was] aware that his . . . conduct [was] practically certain to cause that result." Wis. Stat. § 939.23(4) (defining "with intent"). Thus, consistent with federal circuit interpretations of the phrase "access-with-intent," Beyer could still be convicted even if he never viewed the Count 1 image. *See Tagg*, 886 F.3d at 587. Like Congress, the Wisconsin Legislature, through its amendment of section 948.12(1m), "has unambiguously declared that the act of accessing a website containing child porn—when done with criminal intent—is a sufficiently 'substantial' step to warrant criminal sanctions." *Id*. at 588.

Beyer took substantial steps that triggered "access-with-intent" liability. His steps included intentionally searching for child pornography from the list of torrents, downloading the files, including the Count 1 image, and retaining the Count 1 image in a directory with several other contraband images on a drive that contained several hundred files of suspected child pornography, with the intent to view the images later. (R. 169:28–30; 170; 175:42, 70.) Beyer's steps reflected a purpose to access the Count 1 image with the intent to later view what he believed to be child pornography. Wis. Stat. § 939.23(2) (defining "know" by what actor believes). Thus, even without viewing the Count 1 image, Beyer knowingly accessed the image with intent to view what he believed would be child pornography.

Beyer's case is not one where "no trier of fact, acting reasonably, could have found [him guilty] beyond a reasonable doubt." *Poellinger*, 153 Wis. 2d at 507. To the contrary, even if Beyer never opened the Count 1 image, the factfinder could still reasonably conclude, based on the totality of the evidence, that: (1) Beyer knowingly accessed the Count 1 image with intent to view it; and (2) Beyer reasonably believed that the Count 1 image that he retained on his computer depicted a child engaged in sexually explicit conduct. Therefore, viewing the evidence in a light most

favorable to the conviction, this Court should sustain the guilty verdict.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 12th day of May 2023.

Respectfully submitted,

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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 10,705 words.

Dated this 12th day of May 2023.

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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 12th day of May 2023.

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