STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
****
Case No. 2023AP1042-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-v- **Case No. 2020 CF 40**
(Portage County)

CATHERINE E. EDWARDS,
Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN PORTAGE COUNTY CIRCUIT COURT, THE HONORABLE PATRICIA BAKER PRESIDING

BRIEF OF DEFENDANT-APPELLANT

BY:

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In its decision on defendant's postconviction motions, the trial court did not specifically address whether the relevant act broadened the definition of "lewd exhibition of intimate parts" (113:2, App. at 20).

II. WHETHER THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO SUPPORT THE CHILD PORNOGRAPHY CONVICTIONS IN COUNTS TWO AND THREE.

The trial court denied defendant's motion to dismiss Counts 2 and 3 twice during trial (93:192-94, 94:8-9, App. at 20-22, 23-25). The trial court reaffirmed this position in it order denying postconviction relief (113:2-4, App. at 19-21).

III. WHETHER DEFENDANT SHOULD BE GRANTED A NEW TRIAL BECAUSE, DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL, THE JURY WAS NOT PROPERLY INSTRUCTED ON THE DEFINITION OF "LEWD EXHIBITION OF INTIMATE PARTS.

The trial court denied defendant's postconviction motion for a new trial based on ineffective assistance of counsel (113:2-4, App. at 201-23).

IV. WHETHER DEFENDANT SHOULD BE GRANTED A NEW TRIAL BECAUSE THE STATE MADE AN IMPROPER ARGUMENT IN URGING THE JURY TO FIND DEFENDANT GUILTY OF COUNTS TWO AND THREE BASED ON IMPROPER CONSIDERATIONS.

During trial, the trial court denied defendant's motion for a mistrial based on an alleged improper argument by the State (94:64-67). The trial court reaffirmed this decision in its order denying postconviction relief (113:4, App. at 23).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendant requests neither oral argument nor publication.

STATEMENT OF THE CASE

On 1/31/20, defendant Catherine Edwards was charged in Portage County Circuit Court with the commission of the offenses of: (1) second-degree sexual assault of a child; (2) possession of child pornography; and (3) possession of child pornography, the offenses allegedly committed between October of 2018 and April of 2019 (2). On 3/25/20, a waiver of preliminary hearing form was filed on defendant's behalf (9). On 6/8/20, an information was filed which alleged the same counts as the criminal complaint (15). Not guilty pleas were entered on defendant's behalf (95:2).

On 9/15/21, an other acts motion was filed by the State (38). On 10/4/21, a motion hearing was held (91). On 10/18/21, a second motion hearing was held (92). Pretrial issues were resolved (92). On 10/27/21, a jury trial commenced (93). On 10/28/21, at the conclusion of the jury trial, defendant was found guilty of the three offenses (94:81-83). On 12/22/21, defendant appeared for sentencing (84). The court imposed a total sentence of 13 years in prison, with six years of initial confinement and seven years of extended supervision (84:30-31). Defendant was not made eligible for the Challenge Incarceration Program (CIP) or the Substance Abuse Program (SAP) (84:34). Defendant filed a timely notice of intent to seek postconviction relief.

On 11/28/22, a motion for postconviction relief was filed on defendant's behalf (102). On 3/10/23, a postconviction motion hearing was held (118). The parties were given an opportunity to brief relevant issues (118:26-28). On 5/31/23, the court orally denied defendant's postconviction motions (119). On 6/1/23, a written decision denying defendant's postconviction motions was entered (113, App. at 19-22). On 6/13/23, defendant filed a timely notice of appeal (114).

STATEMENT OF FACTS

Defendant Edwards was charged with three offenses (2). Two of the charges alleged defendant had possessed child pornography between October of 2018 and April of 2019 (2). The photographs in question show the victim, VI[1] in the act of painting (61, 62). While she is completely naked in the photographs, and her breasts are visible in both photographs and her butt is visible in one of them, it does not appear she is posing for the camera (61, 62). There is no specific focus on her private areas in either of the photographs (61, 62).

Defendant was also charged with having sexual intercourse with V1 during that same time period. During trial, the State presented a video showing V1 being vaginally penetrated with an object (60). V1 testified during trial that defendant was the person holding the object at a point during the penetration (93:172).

During closing argument, the State implied defendant was guilty of possession of child pornography in Counts 2 and 3 because she had participated in the production of child pornography by being filmed during the video depicting sexual intercourse (94:48-50). Defense counsel objected to this argument and requested a mistrial (94:60). The trial court denied the motion for relief (94:64-67, App. at 29-32).

[1] The abbreviation "V1" is used to protect the identity of the victim in this matter.

On 11/28/22, a motion for postconviction relief was filed on defendant's behalf (102). Defendant asserted she was entitled to a vacation of her convictions in Counts 2 and 3 and a resentencing (102:1). In the alternative, she argued she was entitled to a new trial based on an improper argument by the State in closing argument and because trial counsel was ineffective in failing to object to trial court's use of a broader definition of "lewd exhibition of intimate parts" that was enacted into law *after* the offenses in Counts 2 and 3 were allegedly committed (102). On 3/10/23, a postconviction motion hearing was held (118). During this hearing, trial counsel testified (118:9-19). He acknowledged the child pornography charges were alleged to have been committed by defendant between October of 2018 and April of 2019 (118:11). He testified he was not aware that the definition of "lewd exhibition of intimate parts" had been modified on in July of 2019 (118:16). He testified he would have wanted a narrower definition of the term at trial because it would have made it more difficult for the State to prove the charges (118:17-18). He testified he would not have had a reason not to seek the narrower definition if it was applicable (118:18).

In its written decision of 6/1/23, the trial court denied defendant's motions (113, App. at 19-22). The trial court apparently conceded it had erred in using the new definition for "lewd exhibition of intimate parts" during trial (118:2). Nevertheless, the court found the error was harmless (118:2-4, App. at 20-22). The court denied the other motions for relief as well (118:4, App. at 22).

ARGUMENT

I. 2019 WI ACT 16, ENACTED IN JULY OF 2019, BROADENED THE DEFINITION OF THE TERM "LEWD EXHIBITION OF INTIMATE PARTS."

A significant portion of defendant's argument revolves around the definition of the term, "lewd exhibition of intimate parts."

A. Wis. Stat. §948.01(1t).

2019 Wisconsin Act 16, effective 7/12/19, created Wis. Stat. §948.01(1t), which reads:

> "Lewd exhibition of intimate parts" means the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts.

The inescapable conclusion one must reach from this definition is that a person whose unclothed intimate parts are displayed is doing so in a lewd fashion if the person is posed as a sex object or there is an unnatural or unusual focus on their intimate parts. Therefore there are two ways a person can display their unclothed intimate parts in a lewd fashion: (1) by being posed as a sex object; or (2) by there being an unnatural or unusual focus on their unclothed intimate parts. One can lewdly display their intimate parts in either or both of these ways. It would be possible for a person to be posed as a sex object. It would be possible for the person to be posed as a sex object but for there not to be an unnatural or unusual focus on their intimate parts. If the legislature had intended the terms "being posed as a sex object" and "there being an unnatural or unusual focus on the intimate parts" to be used interchangeably, there would have been no reason to include the full language used in the statute. Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage. *See State v. Martin,* 162 Wis.2d 883, 894, 470 N.W.2d 900 (1991).

B. *State v. Petrone*.

Prior to the enactment of Wis. Stat. §948.01(1t), the relevant definition was set forth in *State v. Petrone,* 161 Wis.2d 530, 468 N.W.2d 676 (1991):

> Three concepts are generally included in defining "lewd" and sexually explicit. First, the photograph must visibly display the child's genitals or pubic area.[2] Mere nudity is not enough. Second the child is posed as a sex object. The statute defines the offense the offense as one against the child by using the child in that way causes harm to the psychological, emotional and mental health of the child. The photograph is lewd in its "unnatural" or "unusual" focus on the juvenile's genitalia, regardless of the child's intention to engage in sexual activity or whether the viewer or photographer is actually aroused. Last, the court may remind the jurors that they should use these guidelines to determine the lewdness of a photograph but may use commons sense to distinguish between a pornographic and innocent photograph. In this case, looking at the jury instruction as a whole, we conclude that the circuit court accurately apprised the jury of what "lewd" means. The circuit court told the jurors that mere nudity is not enough—the pictures must display the child's genital area; that the photographs must be sexually suggestive; and that the jurors may use common sense to determine whether the photographs were lewd. *Id.* at 561-62.

By the plain language from *Petrone,* in order for a photograph to be lewd it must have all of the following characteristics: (1) It must display the child's intimate part; (2) the child must be posed as a sex object; (3) there must be an unnatural or unusual focus on the intimate area. The relevant definition, as set forth in *Petrone* is narrower than the definition set forth in Wis. Stat. §948.01(1t).

[2] The defense concedes that after *Petrone* was decided, but prior to the date of the alleged possession of child pornography offenses in this case, Wis. Stat. §948.01(7)(e) was amended from lewd exhibition of "the genitals or pubic area," to lewd exhibition of "intimate parts." The broader term "intimate parts" is applicable to the analysis.

II. THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO SUPPORT THE CHILD PORNOGRAPHY CONVICTIONS IN COUNTS TWO AND THREE.

A. Standard of review.

In *State v. Poellinger*, 153 Wis.2d 493, 451 N.W.2d 752, 757-58 (1990), the court wrote:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute 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. (citation omitted). 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.

B. The evidence at trial was insufficient to support defendant's convictions for possession of child pornography.

Defendant was accused of possessing the alleged child pornography charged in Counts 2 and 3, between October of 2018 and April of 2019 (2). This was prior to the creation of Wis. Stat. §948.01(1t). Regardless of how the jury was instructed, the law from *Petrone* applies, not Wis. Stat. §948.01(1t). Under the language from *Petrone,* mere nudity is not enough. *Id.* at 561. There must be an "unnatural" or "unusual" focus on the juvenile's [intimate area]. *Id.*

This court can look at the pictures for itself. To suggest the photographs contain an unnatural or unusual focus on V1's intimate area is pure fancy. How so? There is no focus on the intimate area. It is unreasonable to infer otherwise. V1 is standing in the photographs holding a paint brush or painting. There is no focus whatsoever on the child's intimate areas. If there is no focus on the child's intimate area, the focus cannot be unusual or unnatural. The only way these photographs can meet the definition of child pornography is

to ignore the necessary proof of "unnatural or unusual focus on the intimate area."

Arguably, the child is not posed as a sex object either. There is nothing to suggest she was even aware the photographs were being taken. V1 testified she could not remember who took the photographs (93:170).

In ruling the photographs were child pornography, the trial court noted they were taken after a sexual interlude involving V1 (113:3). What took place immediately prior to the photographs being taken is irrelevant to the equation. What is relevant is the *objective* content of the photographs. The photographs either show or do not show a child engaged in sexually explicit conduct, the second element of the offense (94:22).

While the photographs may be fairly characterized as creepy or tawdry, the photographs depict mere nudity. Mere nudity is insufficient to make these photographs child pornography. Counsel is unaware of any rule of law that says that if the juvenile depicted nude is over a certain age that the image is child pornography as a matter of law. This court must determine the sufficiency of the evidence under *Petrone.* This court cannot ignore the *Petrone* requirement that there be an unusual or unnatural focus on the child's intimate area in determining whether the items were child pornography.

This court should find the images are not child pornography as a matter of law. Defendant's convictions for Counts 2 and 3 should be vacated. The court should remand the case for resentencing.

III. DEFENDANT SHOULD BE GRANTED A NEW TRIAL BECAUSE. DUE TO INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, THE JURY WAS NOT PROPERLY INSTRUCTED ON THE DEFINITION OF "LEWD EXHIBITION OF INTIMATE PARTS.

A. Standard of review.

In *State v. Thiel*, 2003 WI 111, 264 Wis.2d 571, 665 N.W.2d 305, the Wisconsin Supreme Court discussed ineffective assistance of counsel. In *Thiel*, the court said:

> In order to find that counsel rendered ineffective assistance, the defendant must show that trial counsel's

> representation was deficient. (citation omitted). The defendant must show that he or she was prejudiced by deficient performance. Counsel's conduct is constitutionally deficient if it fall below an objective standard of reasonableness. (citation omitted). When evaluating counsel's performance, courts are to be "highly deferential" and must avoid the "distorting effects of hindsight." (citation omitted). Counsel need not be perfect, indeed not even very good, to be constitutionally adequate. (citation omitted). In order to demonstrate that counsel's deficient performance is constitutionally prejudicial, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (citation omitted). *Id*. at ¶¶18-20.

B. Trial counsel was ineffective.

The trial court decided this issue primarily on harmless error or the prejudice prong (113:2-4). While finding trial counsel was not ineffective, it did not specifically address the issue of whether trial counsel's performance was deficient (113:2-4).

Defendant's argument on this issue is simple and logical. The definition of "sexually explicit conduct" changed in July of 2019. Prior to 2019, the definition came from *Petrone.* After July of 2019, the definition came from Wis. Stat. §948.01(1t). For the reasons previously stated, Wis. Stat. §948.01(1t) broadened the definition of the relevant term as defined in *Petrone*. The amendment made it easier to prove a photograph depicted a child engaged in sexually explicit conduct. As the new definition was enacted after defendant allegedly possessed the alleged child pornography, the new definition could not be used at her trial. It would be a flagrant violation of the doctrine of *ex post facto*.

Trial counsel admitted he was unaware of the law change and would have wanted the jury charged with the old definition from *Petrone* rather than the new definition from §948.01(1t). An appropriate instruction would have read in relevant part:

> Three concepts are generally included in defining the lewd [exhibition of an intimate part]. First, the photograph must visibly display the child's [intimate part]. Mere nudity is not enough. Second the child is posed as a sex object. The photograph is lewd in its "unnatural" or "unusual" focus on the juvenile's [private part], regardless of the child's intention to engage in sexual activity or whether the viewer or photographer is actually aroused. Lastly, the jurors should use these guidelines to determine the lewdness of a photograph but may use commons sense to distinguish between a pornographic and innocent photograph.

As the new term made it easier to prove the charged offenses, it was deficient performance for trial counsel to not to have insisted that the court use the preceding *Petrone* definition.

As to prejudice, according to the trial court, it was a close call for the trial court to rule on the issue of whether the charges should have been dismissed at the close of evidence but for testimony from V1 that the photographs were taken immediately after the alleged sexual assault (93:8-9). As the resolution of the lewd exhibition issue is resolved by looking at the photograph and not the subjective intent of the photographer, the issue remains a close call.

As the defense would have been able to argue there was no unnatural or unusual focus on the child's intimate areas, *a necessary proof* for the State per the language from *Petrone,* with law supporting the argument, there is a reasonable likelihood the outcome of trial would have been different but for trial counsel's deficient performance. The argument the photograph depicted mere nudity would have been more likely to carry the day. A new trial is warranted.

IV. DEFENDANT SHOULD BE GRANTED A NEW TRIAL BECAUSE THE STATE MADE AN IMPROPER ARGUMENT IN URGING THE JURY TO FIND DEFENDANT GUILTY OF COUNTS TWO AND THREE BASED ON IMPROPER CONSIDERATIONS.

In *State v. Neuser,* 191 Wis.2d 131, 528 N.W.2d 49 (Ct.App. 1995), the court wrote:

> Generally, counsel is allowed latitude in closing argument and it is within the trial court's discretion to determine the propriety of counsel's statements and arguments to the jury. *State v. Wolff*, 171 Wis.2d 161, 167, 491 N.W.2d 498, 501 (Ct.App.1992). We will affirm the court's ruling unless there has been a misuse of discretion which is likely to have affected the jury's verdict. *See State v. Bjerkaas*, 163 Wis.2d 949, 963, 472 N.W.2d 615, 620 (Ct.App.1991). **The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence. (emphasis added).** *State v. Draize*, 88 Wis.2d 445, 454, 276 N.W.2d 784, 789 (1979). The constitutional test is whether the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Wolff*, 171 Wis.2d at 167, 491 N.W.2d at 501 (quoted source omitted). Whether the prosecutor's conduct affected the fairness of the trial is determined by viewing the statements in context. *Id.* at 168, 491 N.W.2d at 501. Thus, we examine the prosecutor's arguments in the context of the entire trial.

Defendant asserts that when the State argued the video of the sexual assault of V1 was child pornography, it ran afoul of the law from *Neuser.* It invited the jury to find defendant guilty of possessing child pornography because she was alleged to have been in a video where the child was sexually assaulted. There was no substantial proof defendant was aware a video of that sexual assault was being made. While the defense would have to concede the video was not other acts evidence because it appropriate evidence to prove the sexual assault, the argument still was improper because it invited the jury to find defendant guilty for an improper reason, that is because she may have played a part in

producing the video of the sexual assault, she was guilty of possessing child pornography.

Given the weakness of the State's evidence in support of Counts 2 and 3 as set forth above, there is a reasonable probability the State's improper argument interfered with defendant's right to a fair trial on Counts 2 and 3. The argument was of a quality likely to elicit a sentiment from the jury that it did not matter if the images were child pornography because she was guilty of the more serious offense of creating child pornography. Defendant asks this court to find she is entitled to a new trial on all counts based on this error.

CONCLUSION

For the reasons set forth above, defendant's convictions on Counts 2 and 3 should be vacated and the matter should be remanded for resentencing. In the alternative, defendant should be granted a new trial on all counts.

Dated: August 21, 2023

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

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

Dated: August 22, 2023

Attorney for Defendant
Electronically signed by Philip J. Brehm

CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm) and (c) for a brief and is 3,379 words in length, produced with proportional serif font.

Dated: August 22, 2023

Attorney for Defendant
Electronically signed by Philip J. Brehm

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 serve for all participants who are registered users.

Dated: August 22, 2023

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