STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2023AP1042-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CATHERINE E. EDWARDS,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

While investigating a cyber tip about sexual exploitation of a child, police found a video of Edwards sexually assaulting a 14-year-old girl. Police found two more images of the victim, naked, on Edwards's phone. A jury convicted Edwards of sexual assault of a child as party to a crime and two counts of possession of child pornography.

Edwards challenges her convictions on the child pornography counts. She argues that between the date listed in the charging language and the trial, the definition of "lewd" changed when 2019 Wis. Act 16 enacted Wis. Stat. § 948.01(1t). Under the prior definition of lewd, Edwards argues, the evidence adduced at trial was insufficient to convict her, and trial counsel was ineffective for failing to object to the jury instructions. She also argues that the State went too far in its rebuttal argument, and the trial court should have granted her a mistrial.

Edwards is not entitled to relief. The definition of lewd under section 948.01(1t) is not materially different from case law defining the term. Regardless, the evidence was sufficient to convict her under either standard, so she cannot prove prejudice and trial counsel cannot be deficient for failing to make a meritless objection. As to the State's rebuttal argument, the trial court reasonably exercised its discretion when it decided the statement was a fair comment on the evidence and Edwards's credibility. Because the jury instructions were clear about what evidence went toward which child pornography count, and the jury was instructed that argument is not evidence, there was no prejudice to Edwards and a mistrial was not warranted. This Court should affirm.

ISSUES PRESENTED

The State re-frames the issues:

1. Did the State adduce sufficient evidence for a reasonable jury to convict Edwards of the child pornography counts?

The circuit court answered: Yes.

This Court should answer: Yes.

2. Did Edwards receive ineffective assistance of counsel by failing to object to the jury instruction defining lewd?

The circuit court answered: No.

This Court should answer: No.

3. Did the State improperly comment on the evidence during rebuttal argument?

The circuit court answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not believe oral argument is necessary. Under Wis. Stat. § (Rule) 809.22(2)(b), the briefs should fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side. Publication is not warranted. These issues involve the application of well-settled rules of law to the facts. Wis. Stat. § (Rule) 809.23(1)(b)1.

STATEMENT OF THE CASE

In 2019, the Portage County Sheriff's Office received a cyber tip from the National Center for Missing and Exploited Children about sexually explicit materials being shared between Edwards's boyfriend, Nicholas Kvatek, and the child

depicted, V1.[1] (R. 93:108–10.) Detective Kevin Flick used this information to obtain a search warrant for Kvatek's and Edwards's residence. (R. 93:111, 121.) Edwards was located at the residence during the execution of the warrant, and law enforcement seized Kvatek's cell phone and Edwards's cell phone and laptop. (R. 93:112, 114.)

When police examined Kvatek's cell phone, they discovered "hundreds of images of child pornography and two images that appeared to be taken by Nicholas Kvatek of cell phone video of him and a female later identified as . . . Edwards having sexual intercourse with" V1. (R. 93:115.) Police knew it was V1 because she sent it from her Facebook messenger account, and her entire face and body were depicted in the video. (R. 93:116.) V1 was 14 years old at the time. (R. 93:113, 165.) Police identified Kvatek in the video from tattoos seen in the video that police confirmed he had when they interviewed him. (R. 93:116.)

Police identified Edwards because she appeared in the video as "a heavier set Caucasian female," and she spoke during the "sexual encounter to the effect of, 'I know there's a sweet spot in there.'" (R. 93:117.) Detective Flick testified that he recognized Edwards's voice when he interviewed her. (R. 93:117.)

Police examined the contents of Edwards's cell phone and found two images of V1. (R. 93:118–19.) The images depicted V1, with breasts and buttocks exposed, standing in Edwards's living room holding a paintbrush. (R. 93:119; 61; 62.)

The State charged Edwards with sexual assault of a child under 16 years of age as party to a crime, and two counts of possession of child pornography. (R. 2:1–2.) The time frame

[1] Consistent with Wis. Stat. § (Rule) 809.86(4), the State refers to the victim in this case by V1 to protect her identity.

of the charges in the complaint was between October 2018 and April 2019. (R. 2:1–2.)

At trial, Detective Flick described the video. (R. 93:117–18.) V1 is naked on a couch and she, the man, and the woman in the video are all holding her legs up. (R. 93:117.) At the start, "the female is holding a purple dildo and inserting it into [V1's] vagina." (R. 93:117.) The woman's hands are on the dildo and "at times, rubbing [V1's] vagina or holding [V1's] . . . right leg." (R. 93:117–18.)

Detective Flick testified that Edwards's phone also contained a Facebook messenger conversation between Edwards and a person named Lisa in which Lisa references that Edwards "shaved that 14-year-old girls crotch because she begged you to." (R. 93:124; 66.) Detective Flick testified that V1's pubic area was shaved in the video. (R. 93:118.) In a second conversation, Lisa says "[h]ow did you duck (verbatim) it up if it's his move and he chooses a 14-year-old over you? That's on him." (R. 93:124–25; 67.)

When police searched Edwards's residence, the purple dildo was found in Edwards's upstairs bedroom. (R. 93:123; 64.)

Police obtained a subpoena for Facebook's records related to Edwards. (R. 93:125.) This included a conversation between Edwards and V1 where Edwards says "Nick" broke up with her and "[w]ith [her] out of the way, now he can fully enjoy fucking you." (R. 93:126–27.) Edwards further says "I fucked you as well. So let my so-called concerned friends press charges." (R. 93:127; 68.)

V1 testified that she met Kvatek when she was babysitting for a friend of his; she started dating him when she was 14 and he was 40, and she met Edwards while she was still living with Kvatek. (R. 93:137–68.) Her relationship with Kvatek turned sexual. (R. 93:168.) Edwards "forced

herself in[to]" their sexual relationship, joining more than 20 times. (R. 93:171–72.)

V1 recalled painting Kvatek and Edwards's living room and having her picture taken twice, naked and holding a paint brush. (R. 93:170.) V1 claimed she was not posing for the pictures, but admitted they were taken just after having sex with Kvatek and Edwards. (R. 93:181.)

V1 did not know that she was being videotaped on January 4, 2019, but knew that it was Edwards holding the purple dildo. (R. 93:172.) V1 identified Edwards's voice in the video. (R. 93:175–76.)

Edward testified and denied having sexual contact with V1. (R. 93:208.) She denied taking nude photos of V1 and denied knowing those photos were on her cell phone. (R. 93:208.) As to the phone message conversation with V1, Edwards claimed she misspoke and intended to say that she "was getting fucked over by everybody" and not that she had sex with V1. (R. 93:212.) However, on cross-examination, she admitted that none of the conversation leading up to that point had to do with her claim of getting "fucked over by everybody." (R. 93:212, 217–20.) Edwards denied having or taking screenshots of the conversation with Lisa. (R. 93:212–13.) She also claimed not to own the purple dildo recovered from her room. (R. 93:221–22.)

During the jury instruction conference after the parties rested, Edwards's trial counsel did not object to the jury instruction for the two counts of possession of child pornography. (R. 93:245–49.)

When instructing the jury, the circuit court used the jury instruction that reflected the amended statute: "[l]ewd exhibition of intimate parts means the display of less than fully and opaquely covered intimate parts of a person who is posed as sex object or in a way that places an unnatural or unusual focus on the intimate parts." (R. 94:22; 59:5.)

In its rebuttal argument, the State referred to the video of V1's sexual assault at the hands of Kvatek and Edwards as "child pornography involving this child," though Edwards had not been charged with child pornography in connection with the video. (R. 94:48.) Trial counsel objected, and the trial court sustained the objection. (R. 94:48–49.) After the jury was sent to deliberate, trial counsel moved for a mistrial, claiming the State's "rebuttal argument as to - - referring to the picture with the sexual - - actual sex involved as being child pornography when that is not the charge." (R. 94:60.) Trial counsel argued that the State's argument was improper because it gave an incorrect impression that the video was the basis of the child pornography charges, rather than the photographs. (R. 94:61.) The State argued that it was entitled to comment on the evidence and calling the video evidence of the sexual assault child pornography "is simply stating a fact that was put into evidence." (R. 94:60.) It argued that it "was not conflating the 52-second video with the two photographs" and no juror would have concluded that he did. (R. 94:62.)

The trial court noted that the State has considerable latitude in closing argument and is allowed to comment on the evidence. (R. 94:65.) It considered that the agreed-upon jury instructions made it "exceedingly clear" which exhibit related to which count of possession of child pornography. (R. 94:66.) The jury instructions for Counts 2 and 3 specifically referenced Exhibit 2, (R. 61), as being the basis for Count 2 and Exhibit 3, (R. 62), for Count 3, (R. 59:4).

Finally, the court noted that it gave the standard jury instruction that arguments are not evidence, and it denied the motion for a mistrial. (R. 94:67.)

The jury found Edwards guilty of all three counts. (R. 94:81–83; 57:1–3.) The trial court sentenced Edwards to a global sentence of six years of initial confinement and seven years of extended supervision. (R. 83:1–2.)

Edwards filed a motion for postconviction relief alleging essentially the same grounds she raises on appeal: insufficient evidence to support convictions for Counts 2 and 3, improper argument in the State's rebuttal, and ineffective assistance of trial counsel for failing to object to the jury instruction on the definition of lewd. (R. 102:1.)

Edwards argued similarly that the definition of lewd changed with the enactment of Wis. Stat. § 948.01(1t), and the pre-amendment standard should have controlled in her case. (R. 102:4–5.) She claimed that, contrary to a requirement under pre-amendment case law, the photos did "not have an unnatural or unusual focus on an intimate part." (R. 102:5.) And given that the jury instruction reflected the newly enacted section 948.01(1t), she argued that trial counsel was ineffective for failing to object to the jury instruction on lewd. (R. 102:6.) She claimed that it made it easier for the State because the jury only had to determine whether V1 was posed as a sex object, and not whether the photographs had an unusual or unnatural focus on her intimate parts. (R. 102:6.) Finally, Edwards argued that the State's argument during rebuttal that the video was child pornography was improper because it encouraged the jury to find Edwards guilty of Counts 2 and 3 because of evidence related to Count 1. (R. 102:7–8.)

The trial court held a *Machner*[2] hearing, taking the testimony of trial counsel. (R. 118:6.) Trial counsel testified that he did not believe the images on Edwards's phone were child pornography. (R. 118:12, 14.) He was unaware of any change to the definition of lewd, specifically in the enactment of Wis. Stat. § 948.01(1t). (R. 118:16–17.) He believed the law required more than mere nudity, the "child's intimate areas

[2] *State v. Machner*, 92 Wis. 2d 797, 285 N.W. 2d 905 (Ct. App. 1979).

must be displayed . . . in a sexually suggestive manner." (R. 118:17.)

The circuit court did not find deficient performance or prejudice to Edwards. (R. 113:4.) The court noted that the charged time frame for the child pornography counts was October 2018 to April 2019, and the statutory definition of lewd changed on July 11, 2019, with the jury instruction changing in 2020. (R. 113:2.) It found that it used "the new . . . statute as opposed to the broader statute in the correct time frame." (R. 113:2.) Because of this, the court found it read the wrong jury instruction. (R. 113:2.) The circuit court, citing *State v. Beamon*, 2013 WI 47, ¶ 3, 347 Wis. 2d 559, 830 N.W.2d 681, determined that it needed to compare the sufficiency of the evidence presented with what the then-existing definition of lewd required. (R. 113:2–3.)

To do so, the court examined the definition of lewd as found in *State v. Petrone*, 161 Wis. 2d 530, 561, 468 N.W.2d 676 (1991), *overruled on other grounds by State v. Greve*, 2004 WI 69, ¶ 31 n.7, 272 Wis. 2d 444, 681 N.W.2d 479. (R. 113:3.) The court considered that the photographs at issue showed "the victim as fully nude showing specifically her buttocks and breasts and she is holding a paint brush," and according to the victim's testimony, were taken immediately after having had sexual intercourse with Edwards and Kvatek. (R. 113:3.) The court found that the evidence of sexual assault and child pornography were "intertwined with one another." (R. 113:3.) The court also found any error harmless because it instructed the jury on the statutory requirements of possession of child pornography from the information twice. (R. 113:3.)

Turning to trial counsel's motion for a mistrial based on the State's closing argument, the court found that the State's comments "referenced evidence that had been presented to the jury" and "were a reasonable interpretation to assist the jury in coming to the verdict." (R. 113:4.) The argument was a permissible comment upon credibility because Edwards

"denied any involvement in the charged offenses." (R. 113:4.) Because the court read the jury instruction that argument is not evidence, and jurors are presumed to follow instructions, it denied this part of Edwards's motion. (R. 113:4.)

Finally, the circuit court found sufficient evidence to uphold Edwards's convictions. (R. 113:4.) Edwards now appeals.

ARGUMENT

Edwards argues that, under the *Petrone* definition of lewd, the evidence adduced at trial was insufficient to convict her. She argues that trial counsel was ineffective for failing to object to the jury instructions, which, she contends, would have raised the State's burden. She also argues that the State went too far in its rebuttal argument, and the trial court should have granted her a mistrial.

Edwards is not entitled to relief. The definition of lewd under section 948.01(1t) is not materially different from case law defining the term. Regardless, the evidence plainly meets the standard under *Petrone* as well as the statute's definition, so the evidence was sufficient to convict Edwards either way. Therefore, trial counsel cannot be deficient for failing to make a meritless objection. Additionally, Edwards did not prove any prejudice from this failure to object.

As to the State's rebuttal argument, the trial court reasonably exercised its discretion when it considered the statement a fair comment on the evidence and Edwards's credibility. Because the jury instructions were clear about what evidence went toward which child pornography count, and the jury was instructed that argument is not evidence, there was no prejudice to Edwards and a mistrial was not warranted.

I. The State adduced sufficient evidence for a reasonable jury to convict Edwards of the child pornography counts.

Edwards argues that the definition of lewd was broadened by 2019 Wis. Act 16, and further argues that the evidence did not support her conviction under the pre-Act definition. (Edwards's Br. 9–10.) Contrary to his argument, the new statutory definition basically reflects the existing common law definition. But regardless, his argument is misplaced, because the evidence supports the verdict under the relevant pre-amendment case law and under the relevant amended statute.

A. The Legislature's enactment of Wis. Stat. § 948.01(1t) reflects the existing common law definition of lewd.

Wisconsin Stat. § 948.12(1m) prohibits the possession of child pornography. Child pornography includes a "photograph" or "other recording of a child engaged in sexually explicit conduct."

"'Sexually explicit conduct' means actual or simulated: . . . (e) Lewd exhibition of intimate parts." Wis. Stat. § 948.01(7)(e). "[I]ntimate parts" includes "the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being." Wis. Stat. § 939.22(19).

Prior to 2019 Wis. Act 16, "lewd exhibition of intimate parts" was not defined in the statutes, nor was a single definition established by cases interpreting similar child pornography laws. *State v. Lala*, 2009 WI App 137, ¶ 11, 321 Wis. 2d 292, 773 N.W.2d 218 (citation omitted). Before the Act, this Court upheld a circuit court's reliance on the ordinary and accepted meaning of "lewd" as defined in a recognized dictionary to mean "inclined to, characterized by, or inciting to lust or lechery" and "inciting to sensual desire

or imagination." *State v. Lubotsky*, 148 Wis. 2d 435, 438–39, 434 N.W.2d 859 (Ct. App. 1988) (citation omitted).

After *Lubotsky*, our supreme court observed that there is no one definition of lewd established in case law. *Petrone*, 161 Wis. 2d at 561. The *Petrone* court illustrated "concepts [ ] generally included in defining 'lewd' and sexually explicit." *Id.* At a minimum, an image "must visibly display the child's genitals or pubic area[, but] [m]ere nudity is not enough." *Id.* The court further remarked:

> Second, the child is posed as a sex object. The statute defines the offense as one against the child because 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 they may use common sense to distinguish between a pornographic and innocent photograph.

Id.

The *Petrone* court approved of the circuit court's instruction that "examples of sexually suggestive or lewd photographs of a child would be those in which the child is depicted or posed in such a way as to depict or suggest a willingness to engage in sexual activity or a sexually coy attitude." *Id.* at 559, 561–62 (citation omitted).

"The determination of what is lewd and therefore 'sexually explicit conduct' . . . is a common sense factual finding to be made by the trier of fact." *Lala*, 321 Wis. 2d 292, ¶ 20; *Petrone*, 161 Wis. 2d at 561. A factfinder must use common sense when determining whether an image is pornographic or innocent. *Petrone*, 161 Wis. 2d at 561–62.

In *Petrone*, the supreme court defined "lewd" based in part on its consideration of federal case law. *Petrone*, 161 Wis. 2d at 561. In assessing whether a visual depiction of a minor constituted a lewd or "lascivious exhibition of genitals or pubic area" under a federal law, a district court identified six relevant factors.

> 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
>
> 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
>
> 4) whether the child is fully or partially clothed, or nude;
>
> 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
>
> 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987), and *aff'd*, 813 F.2d 1231 (9th Cir. 1987). Courts have recognized that the *Dost* "factors are neither exclusive nor conclusive." *United States v. Hill*, 459 F.3d 966, 972 (9th Cir. 2006). Rather, the determination of whether an image is lascivious is "made based on the overall content of the visual depiction." *Id*. (citation omitted.) While the *Dost* criteria relates to an interpretation of a federal statute more narrowly drafted than section 948.12(1m) because it is limited to the genitalia and pubic area, it nonetheless illustrates that what makes a photograph lewd depends on many considerations.

Edwards argues that *Petrone* created three requirements for a photograph to be lewd: 1) displaying

intimate parts, 2) posed as a sex object, and 3) an unusual or unnatural focus on the intimate parts. (Edwards's Br. 10.) She seems to argue that "posing as a sex object" and "an unusual or unnatural focus on the intimate parts" are different elements of a test that must be satisfied to constitute lewdness. Edwards's position is unsupported by a plain reading of *Petrone*, and she cites no authority that interprets it this way. As shown, the *Petrone* court observes three concepts that are generally included in defining "lewd." In other words, while these concepts are guidelines, the court was not prescribing rigid and mutually exclusive elements that must be satisfied.

Wisconsin Stat. § 948.01 was amended by 2019 Wis. Act 16 by adding a definition of "lewd exhibition of intimate parts" that is largely reflective of the concepts observed in *Petrone*: "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." Wis. Stat. § 948.01(1t). This definition was enacted July 10, 2019, under 2019 Wis. Act 16. It largely reflects the common law concepts of lewd by requiring: 1) "display of . . . intimate parts of a person" and 2) posing the person "as a sex object or in a way that places an unnatural or unusual focus on the intimate parts." Wis. Stat. § 948.01(1t).

While this subsection is not ambiguous, legislative materials help confirm the subsection's meaning. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 51, 271 Wis. 2d 633, 681 N.W.2d 110 ("legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation"). The Legislative Council materials relating to 2019 Senate Bill 68, which became 2019 Wis. Act. 16, demonstrate that it was the Legislature's intention to codify the case law on lewdness. The senator who introduced the bill, in testimony before the Senate Committee on Judiciary and Public Safety, stated that the bill was intended to address a

loophole in child pornography cases whereby materials depicting nearly nude children or in see-through clothing did not count as child pornography. Wis. Legis. Council, Hearing Materials for 2019 Wis. S.B. 68 at 1, Testimony of State Sen. Andre Jacque, Sen. Comm. on Judiciary and Public Safety (May 7, 2019), https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2019/sb68/sb0068_2019_05_07.pdf The aim of the bill was to close this loophole "while codifying existing case law and defining lewd exhibition of intimate parts." *Id*. The senator reiterated this in a memo submitted to the Committee the same day, quoting from *Petrone*. *Id*. p. 2–3.

In short, the statute is not materially different from *Petrone*. But regardless, under both the common law concepts and the amended statute's definition, the State presented sufficient evidence to convict Edwards for the pictures found on her phone, and trial counsel was not deficient for failing to object to the jury instruction.

B. The State presented sufficient evidence to support Edwards's convictions on the child pornography counts, and Edwards has suffered no prejudice.

Edwards claims that the photographs at issue for Counts 2 and 3 are insufficient to convict her because they depict "mere nudity" and are therefore not lewd. (Edwards's Br. 11–12.) He is incorrect.

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. A reviewing court upholds a jury verdict "unless the evidence, viewed most favorably to the State and to the conviction, is so insufficient as a matter of law that no reasonable trier of fact could have found guilt beyond a

reasonable doubt." *State v. Doss*, 2008 WI 93, ¶ 21, 312 Wis. 2d 570, 754 N.W.2d 150.

"A conviction based on a jury's verdict will be sustained unless 'the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" *State v. Hanson*, 2012 WI 4, ¶ 31, 338 Wis. 2d 243, 808 N.W.2d 390 (quoting *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990)). "This high standard translates into a substantial burden for a defendant seeking to have a jury's verdict set aside on grounds of insufficient evidence." *Id.* "Once the jury accepts the theory of guilt, an appellate court need only decide whether the evidence supporting that theory is sufficient to sustain the verdict." *State v. Mertes*, 2008 WI App 179, ¶ 11, 315 Wis. 2d 756, 762 N.W.2d 813.

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

"It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Poellinger*, 153 Wis. 2d at 506.

"[W]hen faced with a record of historical facts which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." *Poellinger*, 153 Wis. 2d at 506–07. "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," this Court "may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." *Id.* at 507.

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

Here, the photos qualify as "lewd" under *Petrone,* as well as under the amended statute. Edwards' arguments to the contrary miss the mark.

1. The photos qualify as lewd under *Petrone* and under the amended statute.

Under the definition of lewd under *Petrone*, Exhibits 2 and 3 are lewd. *Petrone*, 161 Wis. 2d at 561. The images depicted V1 standing sideways, with breasts and buttocks exposed, standing in Edwards's living room holding a paintbrush. (R. 93:119; 61; 62.) V1 recalled having her picture taken twice, naked and holding a paint brush. (R. 93:170.) V1 testified that the photos were taken after having sex with Kvatek and Edwards. (R. 93:181.)

First, V1 is indisputably naked, and her intimate areas are showing. *Petrone*, 161 Wis. 2d at 561. Given that the photos were taken after having sex with Kvatek and Edwards, a reasonable jury could conclude that they "incit[ed Edwards] to sensual desire or imagination." *Lubotsky*, 148 Wis. 2d at 438–39. A reasonable jury could conclude that the way V1 is framed in the picture places an unusual or unnatural focus on her intimate areas—she is a 14-year-old girl photographed naked from the side, so the photo includes both her breast and buttocks. (R. 93:119.) And a reasonable

observer could look at the photos and consider V1 posed as a sex object, since she is naked and holding a paintbrush, which is an unusual thing for a fourteen-year-old to do naked. *Petrone*, 161 Wis. 2d at 561. The jury could use their common sense to determine that the image is pornographic, not innocent. *Id*.

To the extent it makes a difference, the photographs also meet the definition of lewd under the statute. The circuit court's instruction, the now-standard instruction, incorporates the amended statute. (R. 94:22; 59:5.) *See also* Wis. JI–Criminal 2146A (2020).[3] To prove Edwards guilty of possession of child pornography, the State was required to prove four elements:

1) Edwards knowingly possessed a recording.

2) The recording showed a child engaged in sexually explicit conduct.

> "Sexually explicit conduct" means actual or simulated masturbation or lewd exhibition of an intimate part.
>
> "Intimate Part" means the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being.
>
> *" ' "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*.' Wis. Stat. § 948.01(1t)"

[3] The jury instruction was revised in July 2019 to reflect the enactment of 948.01(1t) and its statutory definition of lewd. Wis. JI–Criminal 2146A Comment.

3) Edwards knew or reasonably should have known that the recording contained depictions of a person engaged in actual or simulated sexually explicit conduct.

4) Edwards knew or reasonably should have known that V1 was under the age of 18 years.

See Wis. JI–Criminal 2146A (emphasis added).

Exhibits 2 and 3 are lewd under this definition because V1's intimate areas (her breast and buttock) are exposed. (R. 93:119.) Even if V1 did not believe she was posed, the framing of the photos deliberately capture V1's intimate areas, so she is effectively posed and the photos have an unusual and unnatural focus on her intimate parts. (R. 93:119; 61; 62.)

Because the photographs could reasonably be construed as lewd under *Petrone* as well as the amended statute, the evidence was not "so insufficient as a matter of law that no reasonable trier of fact could have found guilt beyond a reasonable doubt." *Doss*, 312 Wis. 2d 570, ¶ 21.

2. Edwards's arguments to the contrary miss the mark.

Edwards argues that the photos are not lewd because there is not an unusual or unnatural focus on V1's intimate area. (Edwards's Br. 11–12.) She asks this Court to find, as a matter of law, that the images are not child pornography because they do not meet the standard under *Petrone*. (Edwards's Br. 12.) In doing so, Edwards asks this Court to do exactly what *Poellinger* prohibits: substituting itself as fact finder. *Poellinger*, 153 Wis. 2d at 506.

Moreover, Edwards misunderstands *Petrone*. *Petrone* did not set rigid requirements—it explicitly stated that in determining lewdness, juries should use their common sense. *Petrone*, 161 Wis. 2d at 561. The supreme court approved of

the circuit court's instruction that mere nudity was not enough, "that the photographs must be sexually suggestive." *Id*. The court also said a "photograph is lewd in its 'unnatural' or 'unusual' focus on the juvenile's" intimate area. *Id*. The court did not, therefore, require both posing as a sex object and having an unusual or unnatural focus on intimate areas—either one suffices. *Id*. But the concepts clearly can overlap—the child is posed as a sex object because of the unusual or unnatural focus on their intimate areas. That is the case here; the nature of the photographs and the circumstances of their creation demonstrate that V1 was posed as a sex object and the photos have an unusual or unnatural focus on her intimate areas. The photos were taken after having had sex with Edwards. (R. 93:181.) V1 is photographed from the side, such that both her breast and buttock are visible. (R. 93:119.) V1 was 14, naked, and doing an activity that is unusual to do while naked. These circumstances demonstrate an unnatural focus on her intimate areas. *Petrone*, 161 Wis. 2d at 561

Edwards states "[a]rguably, the child is not posed as a sex object either. There is nothing to suggest she was even aware the photographs were being taken." (Edwards's Br. 12.) The latter contention is contradicted by the record; V1 testified that she did recall having her picture taken. (R. 93:170.) Furthermore, the State maintains that being "posed" as a sex object is not a firm requirement in the literal sense, nor necessarily a separate consideration from an unusual or unnatural focus on the child's intimate parts, *see* sec. IA, *supra*. It is Edwards's contention that they are separate, this argument is undeveloped. Edwards provides no authority for how to interpret and apply "sex object" and concedes that the jury reached a reasonable conclusion by calling it "arguable." *State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (this Court "will not decide issues that are not, or inadequately, briefed").

Finally, the jury was entitled to consider Edwards's testimony and credibility. She testified that she never had sex with V1 and did not knowingly possess the photos. (R. 93:208.) The jury was entitled to draw negative inferences against Edwards because of V1's testimony and the physical evidence, the evidence from Edwards's phone and her Facebook's messenger that made her an incredible witness. (R. 93:124–27.)

For these reasons, the jury's verdict on these counts should be upheld.

II. Edwards's trial counsel did not render ineffective assistance for failing to object to a correct statement of the law.

While the circuit court found that it read an incorrect jury instruction, (R. 113:2), this Court should disagree and affirm on a different basis. *State ex rel. Harris v. Milwaukee City Fire & Police Comm'n,* 2012 WI App 23, ¶ 9, 339 Wis. 2d 434, 810 N.W.2d 488. For the reasons outlined above, sec. IA, *supra*, the definition of lewd under *Petrone* and Wis. Stat. § 948.01(1t) are not materially different, especially given the facts of this case. But even if this Court disagrees, there was no prejudice here, and this Court could affirm on that narrow basis. *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) ("An appellate court should decide cases on the narrowest possible grounds.").

A. Edwards failed to establish prejudice.

Even if the jury instruction was incorrect and to Edwards's disadvantage (it wasn't), Edwards still must prove prejudice to prove ineffective assistance. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). Prejudice occurs when the attorney's error is of such magnitude that there is a "reasonable probability" that but for the error the outcome would have been different. *State v. Erickson*, 227 Wis. 2d 758,

769, 596 N.W.2d 749 (1999). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' That requires a 'substantial,' not just 'conceivable,' likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (citations omitted).

As to prejudice from trial counsel's alleged deficiency, Edwards argues that she "would have been able to argue there was no unnatural or unusual focus on the child's intimate areas." (Edwards's Br. 14.) This argument is undeveloped and factually incorrect. Trial counsel *did* argue at the end of the State's case that the photos at issue for the child pornography counts were not lewd because V1 was not "posed as a sex object or in ways that place an unnatural or unusual focus on the intimate part." (R. 93:192–93.) At the close of evidence, trial counsel repeated "basically the same record we made before is that, after all the evidence, I don't think [the jury] can find that these two photos, as they stand, fit the definition of sexually explicit behavior." (R. 94:6–7.)

Edwards does not demonstrate how, under her interpretation of the law, a different argument would have led to her acquittal. At best, she argues that her "argument the photograph[s] depicted mere nudity would have been more likely to carry the day." (Edwards's Br. 14.) This vague language is conclusory and fails to demonstrate a substantial likelihood of a different result. *Pinholster*, 563 U.S. at 189.

Edwards fails to sufficiently demonstrate prejudice because, even under her three-part interpretation of lewdness, the State had to prove an unusual or unnatural focus on V1's intimate area. *Compare Petrone,* 161 Wis. 2d at 561, *with* Wis. Stat. § 948.01(1t). Again, whether a picture depicts mere nudity or has an unnatural or unusual focus on a person's intimate area is fundamentally a jury question, and the jury reasonably found against her, for all the reasons discussed above. *Lala*, 321 Wis. 2d 292, ¶ 20. Edwards fails to meet her high burden of proving prejudice.

B. Edwards's trial counsel did not render deficient performance.

While this Court need not reach the issue, it could additionally (or alternatively) conclude that there was no deficient performance.

The circuit court instructed the jury that "[l]ewd 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." (R. 94:22; 59:5.)

To decide whether the jury instruction correctly stated the law, this Court will have to interpret Wis. Stat. § 948.01(1t) and compare it with what the law was before 2019 Wis. Act 16; this presents a question of law this Court reviews de novo. *State v. Popenhagen*, 2008 WI 55, ¶ 163, 309 Wis. 2d 601, 749 N.W.2d 611.

Edwards's trial counsel did not object to the proposed jury instructions for the child pornography counts. (R. 93:245–49.) Wisconsin stat. § 805.13(3) provides that "[f]ailure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict." *See also State v. Glenn*, 199 Wis. 2d 575, 589, 545 N.W.2d 230 (1996).

This Court can only review an unobjected to jury instruction under the rubric of ineffective assistance of counsel. *State v. Carprue*, 2004 WI 111, ¶ 47, 274 Wis. 2d 656, 683 N.W.2d 31. Edwards claims that he received ineffective assistance when trial counsel "was unaware of the law change and would have wanted the jury charged with the old definition from *Petrone*." (Edwards's Br. 14.)

"Under the Sixth and Fourteenth Amendments to the United States Constitution, a criminal defendant is guaranteed the right to effective assistance of counsel." *State v. Balliette*, 2011 WI 79, ¶ 21, 336 Wis. 2d 358, 805 N.W.2d 334. A defendant "must show two elements to establish that

[his or her] counsel's assistance was constitutionally ineffective:" (1) "counsel's performance was deficient;" and (2) "the deficient performance resulted in prejudice to the defense." *Id*. A reviewing court need only address one prong if a defendant fails to carry their burden in proving it. *Strickland*, 466 U.S. at 697.

"An ineffective assistance of counsel claim presents a mixed question of fact and law." *State v. Pico*, 2018 WI 66, ¶ 13, 382 Wis. 2d 273, 914 N.W.2d 95. This Court "will not reverse the circuit court's findings of fact unless they are clearly erroneous," but will "independently review, as a matter of law, whether those facts demonstrate ineffective assistance of counsel." *Id*.

For the reasons argued above, sec. IA, 2019 Wis. Act 16 did not materially change the law about lewdness. It reflects, or perhaps even codifies, the existing case law. Therefore, the jury instructions correctly stated the law. The court instructed the jury that "'[l]ewd 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." (R. 94:22; 59:5.) Since the statute merely codified the law, then the instruction was correct and trial counsel cannot be ineffective for failing to make a meritless objection. *Pico*, 382 Wis. 2d 273, ¶ 28.

Even assuming that the common law conception of lewd is in fact broader than the statute, Edwards's argument for deficient performance still fails. Edwards's sufficiency-of-the-evidence argument is premised on her belief that 2019 Wis. Act. 16 makes conviction *easier* for the State because the State can prove lewdness by either the child being posed as a sex object *or* by the photographs having an unusual or unnatural focus on the child's intimate areas, as opposed to requiring both. (Edwards's Br. 13.) However, *Petrone* clearly and repeatedly stated that there was "no one definition" for lewd

and jurors should use their "common sense to distinguish between a pornographic and innocent photograph." *Petrone*, 161 Wis. 2d at 561. Being posed as a sex object or having unusual or unnatural focus are two ways a photo can be lewd, but the court also approved of the circuit court's instruction about sexual suggestiveness, therefore implying that there are more ways to establish lewdness. *Id* at 559–60.

For these reasons, even if the existing case law was arguably broader than Wis. stat. § 948.01(1t), trial counsel was not deficient for failing to object to an instruction that narrowed the ways the State could prove lewdness. *Pico*, 382 Wis. 2d 273, ¶ 28.

III. The State's argument was a permissible comment on the evidence and argument about credibility, and any error was harmless.

In the State's rebuttal argument, trial counsel objected to the State's comment that Detective Flick "identified that dildo as being the dildo that was used in this child pornography -- when this defendant and her boyfriend manufactured this child pornography involving this child." (R. 94:48–49.) After the jury was sent to deliberate, trial counsel moved for a mistrial, claiming the State's "rebuttal argument as to - - referring to the picture with the sexual - - actual sex involved as being child pornography when that is not the charge." (R. 94:60.)

The trial court denied the motion, holding that the State has considerable latitude in closing argument and is allowed to comment on the evidence. (R. 94:65.) The agreed-upon jury instructions made it "exceedingly clear" which exhibit related to which count of possession of child pornography. (R. 94:66.) Finally, the court gave the standard jury instruction that arguments are not evidence. (R. 94:67.)

Postconviction, the circuit court found that the State's comments "referenced evidence that had been presented to

the jury" and "were a reasonable interpretation to assist the jury in coming to the verdict." (R. 113:4.) The argument was a permissible comment upon credibility because Edwards "denied any involvement in the charged offenses." (R. 113:4.)

"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. Neuser*, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). Appellate courts will "affirm the court's ruling" as to the propriety of counsel's statements "unless there has been a misuse of discretion which is likely to have affected the jury's verdict." *Id.*

A prosecutor cannot go "beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence." *Neuser*, 191 Wis. 2d at 136. "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.'" *Id.* (citation omitted). To do so, a reviewing court must examine the statements within the context of the entire trial. *Id.*

Edwards argues that the State's comments "invited the jury to find [Edwards] guilty of possessing child pornography because she was alleged to have been in a video where the child was sexually assaulted." (Edwards's Br. 15.)

This argument misses the mark because, while Edwards was not charged with possession of child pornography for the sexual assault of V1 as depicted in the video described to the jury, the State was entitled to argue its case that it was Edwards participating in the assault and the video itself is child pornography as a comment on the evidence. The State's comments were clearly related to the sexual assault count and said nothing about Counts 2 and 3. The trial court correctly found that the jury instructions for Counts 2 and 3 were exceedingly clear because the

instructions specifically referenced Exhibit 2, (R. 61), as being the basis for Count 2 and Exhibit 3, (R. 62) for Count 3, (R. 59:4).

Finally, the jury was instructed that argument is not evidence, (R. 94:28; 59:8), and curative instructions are presumed to be sufficient to ameliorate prejudice. *See State v. Gary M.B.*, 2004 WI 33, ¶ 33, 270 Wis. 2d 62, 676 N.W.2d 475.

Therefore, there is no chance that the State's comments affected the jury's verdict on Counts 2 and 3. Detective Flick testified about the video separately from the photos found of Edwards's phone. (R. 93:113–17, 118–19.) V1 testified about the sexual assault and the photos. (R. 93:172, 181.) The evidence was overwhelming, so there is no reasonable probability of a different result. *Neuser*, 191 Wis. 2d at 136. If this Court disagrees, then the circuit court should have granted Edwards's motion for a mistrial, and remand for a new trial. *Neuser*, 191 Wis. 2d at 141.

CONCLUSION

This Court should affirm.

Dated this 24th day of October 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 7,538 words.

Dated this 24th day of October 2023.

Electronically signed by:

John D. Flynn
JOHN D. FLYNN

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 Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 24th day of October 2023.

Electronically signed by:

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