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

DEFENDANT-APPELLANT'S REPLY BRIEF

BY:

Philip J. Brehm
Attorney for Def.-App.
Bar No. 1001823

23 West Milwaukee, #200
Janesville, WI 53548
Ph. 608/756-4994
philbreh@yahoo.com

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I. 2019 WI ACT 16, ENACTED IN JULY OF 2019, BROADENED 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.

In analyzing this statute, the State writes:

> 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 as observed in *Petrone.* (emphasis added). … It *largely* reflects the common law concepts of lewd by requiring 1) "display of … intimate parties 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) (State's brief at 18).

The State concedes this statute was enacted to "close a loophole in child pornography cases whereby materials depicting nearly nude children or in see-through clothing did not count as child pornography (State's brief at 18-19). By definition, to close a loophole, a newly enacted criminal statute must more broadly encompass proscribed behavior. Likewise, the State concedes "[t]he aim of the bill was to close this loophole 'while codifying existing case law *and* defining lewd exhibition of intimate parts.'" (State's brief at 19). (emphasis added). The "and" again leaves open the reasonable inference that the enacted statute not only codified existing case law but that it also broadened the definition of "lewd exhibition" to combat the exploitation of children.

B. *State v. Lala*

As previously argued by the defense, prior to the enactment of Wis. Stat. §948.01(1t), the relevant definition of "lewd" was set forth in *State v. Petrone,* 161 Wis.2d 530, 468 N.W.2d 676 (1991). As noted in the State's brief, after *Petrone, State v. Lala,* 2009 WI App 137, 321 Wis.2d 292, 773 N.W.2d 218 was decided (State's brief at 15-16). *Lala* confirms defendant's argument that the definition of lewd exhibition was narrower prior to the enactment of Wis. Stat. §948.01(1t):

> Sexually explicit conduct as defined in WIS. STAT. §948.01(7)(e) includes actual or simulated "lewd exhibition of intimate parts." The term "lewd," however, is not statutorily defined, nor has a single definition been established by cases interpreting similar child pornography laws. *See State v. Petrone*, 161 Wis.2d 530, 561, 468 N.W.2d 676 (1991). Nonetheless, the Wisconsin Supreme Court has noted that three concepts are generally included in defining "lewd" and sexually explicit:
>
> First, the photograph must visibly display the child's genitals or pubic area. Mere nudity is not enough. 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.... 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.* (emphasis added). *Id.* at ¶11.

By the plain language from *Petrone* and *Lala,* 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; and (3) there must be an unnatural or unusual focus on the intimate area. The relevant definition, as set forth in *Petrone* and *Lala* is narrower than the definition set forth in Wis. Stat. §948.01(1t).

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

The state and the defense agree the relevant standard of review is set forth in *State v. Poellinger*, 153 Wis.2d 493, 451 N.W.2d 752, 757-58 (1990).

In addressing the sufficiency of the evidence in this case, the State attempts to avoid the language from *Petrone* and *Lala* in two ways. It cites *United States v. Dost,* 636 F. Supp. 828, 832 (S.D. Cal. 1986) (State's brief at 17). In *Dost,* the federal court recognized six relevant factors in determining whether an image was child pornography under federal law. However, federal case law is not instructive in resolving the issues in this state court case.

The State also argues the concepts in *Petrone* and *Lala* are merely concepts to guide the jury in determining what is lewd (State's brief at 16). In making this argument, the State does not explain why it would not have to also demonstrate that the child is both posed as a sexual object and that the there is an unnatural and unusual focus on the intimate area of the child, minimum requirements from *Petrone* and *Lala.*

As previously argued, in order to be child pornography, there must be an "unnatural" or "unusual" focus on the juvenile's intimate area. There is no "focus" on the intimate area of the child in this case. The State urges this court to ignore the "focus" requirement. It argues:

> 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 posted 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. (State's brief at 21-22).

As argued by the State, the "focus" on the intimate area is the nudity itself. The State does not explain how the photos depict focus on the intimate area. Again, as previously argued, this court should find as a matter of law the photographs are not child pornography. The convictions should be vacated and the matter should be remanded to the trial court for resentencing.

III. DEFENDANT SHOULD BE GRANTED A NEW TRIAL BECAUSE: (1) THE JURY WAS NOT PROPERLY INSTRUCTED ON THE DEFINITION OF "LEWD EXHIBITION OF INTIMATE PARTS; AND (2) THE STATE MADE AN IMPROPER ARGUMENT IN URGING THE JURY TO FIND DEFENDANT GUILTY OF COUNTS TWO AND THREE BASED ON IMPROPER CONSIDERATIONS.

A. Jury instruction issue.

This argument is made in the alternative to the above argument related to the sufficiency of the evidence. As previously asserted by defendant, §948.01(1t) made it easier for the State to prove the lewd exhibition of the intimate area. Because the possession of child pornography offenses predated the enactment of §948.01(1t), defendant reasonably was entitled to have the jury instructed as set forth in *Lala:*

> In order for you to find a photograph to be a lewd exhibition of an intimate part, first it must visibly display the child's [intimate area]. Mere nudity is not enough. Second, the child must be posed as a sex object. Third, the photograph must have an "unnatural" or "unusual" focus on the juvenile's intimate area. You should use these guidelines to determine whether the photograph is sexual explicit. You may use common sense to distinguish between a pornographic and innocent photograph.

Instead, the jury was instructed:

> "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" (94:22, 59:5).

Acquittal would have been more likely had the jury been instructed with the language from *Lala,* as opposed to that from §948.01(1t). Defense counsel admitted he would have requested the narrower language pre-dating the enactment of the statute. The failure to catch this law change was deficient performance. The error was prejudicial in that it made it easier for the State to prove its case on the child pornography charges. This error mattered. The two relevant photographs have no direct focus on the child's intimate area. The child is not posed for these photographs. Objectively, other than the nudity itself, there is nothing sensual or sexual about the contents of the photographs. In short, there is a reasonable likelihood the outcome on Counts 2 and 3 would have been different but for this error by counsel. A jury properly instructed reasonably could have acquitted defendant on these counts. Upon conviction, a mandatory three years in prison, without the possibility of early release was required. In the alternative to the argument above, if the images are not child pornography as a matter of law, then defendant should be granted a new trial on these two counts.

Defendant is not profiteering from some loophole. She was entitled to have the jury instructed properly. It is worthy of note that the resolution of this issue in defendant's favor is not one likely to open the floodgates for future defendants to seek relief. The fact pattern in this case is unique. The relevant law change is now over four years old.

B. Improper argument

Defendant Edwards relies on the argument previously made on her behalf.

CONCLUSION

For the reasons set forth above, defendant Edwards should be granted the relief requested.

Dated: November 4, 2023

Attorney for Defendant
Electronically signed by Philip J. Brehm
Bar No. 1001823,
philbreh@yahoo.com

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 1,585 words in length, produced with proportional serif font.

Dated: November 4, 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: November 4, 2023

Attorney for Defendant
Electronically signed by Philip J. Brehm