STATE OF WISCONSIN
SUPREME COURT
****
Case No. 2023AP1042-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

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

CATHERINE E. EDWARDS,
Defendant-Appellant-Petitioner.

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

PETITION FOR REVIEW

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

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 43-46). In its 3/6/25 decision, the court of appeals found the 2019 amendment did not materially change the definition (App. at 36).

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 47-49, 50-52). The trial court reaffirmed this position in it order denying postconviction relief (113:2-4, App. at 43-46). The court of appeals concluded there was sufficient evidence to support defendant's convictions for possession of child pornography (App. at 25-33).

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 44-45). The court of appeals upheld the trial court's ruling on this issue (App. at 33-36).

STATEMENT OF CRITERIA SUPPORTING REVIEW

Defendant asserts there are two issues worthy of review in this case. The first issue is whether 2019 WI Act 16, enacted in July of 2019, broadened the definition of the term "lewd exhibition of intimate parts." Prior to the enactment of the relevant statute, there was no statutory definition. As recognized in *State v. Lala,* 2009 WI App 137, ¶11, 321 Wis.2d 292, 773 N.W.2d 218, there were conceptual definitions. If review is granted, the court will be able to develop the law on the whether the case law definitions of the term are essentially the same as the one enacted by the new statute. Defendant asserts this matters. Child pornography can be possessed for lengthy periods of time. The statute is less than six years old. It would still be very possible for prosecutors to charge possession of child pornography for periods prior to July of 2019. It would be possible for the same defendant to be charged with offenses committed prior to and after the enactment of the statute. Review would be productive on this issue.

The second issue is whether a picture of a naked teenaged girl engaged in nonsexual behavior, *without any focus on her intimate areas,* would be child pornography. Notwithstanding the language in caselaw and in the relevant jury instruction that mere nudity is not sufficient, in this case, the trial court and the court of appeals concluded this was a jury question. If review is granted, defendant will ask this court to conclude that the images in question are not child pornography as a matter of law. Objectively, there is no unnatural or unusual focus on the intimate areas of the girl in photographs in question. If review is granted, defendant will ask this court to confirm that mere nudity, without focus on the intimate areas would be insufficient to support a conviction for possession of child pornography. Of course, this issue matters a great deal in that possession of child pornography ordinarily exposes an adult to three years of initial confinement, without any hope of early release. The distinction matters not only to defendant, but defendants in the future.

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). On 3/6/25, the court of appeals affirmed the decision of the trial court (App. at 18-42)

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, VI1 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). Defendant was convicted of each charge and she was sentenced to prison.

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 43-46). 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 46). Defendant filed a timely notice of appeal. On 3/6/25, the court of appeals affirmed the decisions of the trial court (App. at 18-42).

ARGUMENT

I. IF REVIEW IS GRANTED, DEFENDANT WILL ARGUE 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.

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).

In analyzing this statute, the State wrote:

> 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 conceded 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. 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. 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).

C. *State v. Lala.*

After *Petrone, State v. Lala,* 2009 WI App 137, 321 Wis.2d 292, 773 N.W.2d 218 was decided. *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). If review is granted, defendant will assert the definition of lewd was narrower than it was at the time of the enactment of the relevant statute.

II. IF REVIEW IS GRANTED, DEEFENDANT WILL ARGUE 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. IF REVIEW IS GRANTED, DEFENDANT WILL ARGUE SHE SHOULD BE GRANTED A NEW TRIAL BECAUSE: THE JURY WAS NOT PROPERLY INSTRUCTED ON THE DEFINITION OF "LEWD EXHIBITION OF INTIMATE PARTS.

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.

CONCLUSION

For the reasons set forth above, this Court should grant defendant's petition for review.

Dated: March 26, 2025

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

APPENDIX CERTIFICATION

I hereby certify that filed with this petition 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: March 26, 2025

Attorney for Defendant
Electronically signed by Philip J. Brehm

CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this petition conforms to the rules contained in Wis. Stat. §809.62(4) for a petition for review produced with proportional serif font. The length of this petition is 3,633 words.

Dated: March 26, 2025

Attorney for Defendant
Electronically signed by Philip J. Brehm

CERTIFICATE OF EFILE/SERVICE

I hereby certify that that I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§809.62(4)(b) and 809.19(12). I further certify that: (1) This electronic petition for review is identical in content and format to the printed form of the petition for review filed as of this date; and (2) A copy of this certificate has been served with the paper copies of this petition for review filed with the court and served on all opposing parties.

Dated: March 26, 2025

Attorney for Defendant
Electronically signed by Philip J. Brehm

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