FILED
04-09-2025
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2023AP1042-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CATHERINE E. EDWARDS,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

JOHN D. FLYNN
Assistant Attorney General
State Bar #1096413

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7324
(608) 294-2907 (Fax)
flynnjd@doj.state.wi.us

INTRODUCTION

The State of Wisconsin opposes Edwards' petition for review. This case does not present any "special and important reasons" for granting review. Wis. Stat. § (Rule) 809.62(1r).

This case concerns the definition of "lewd exhibition of intimate parts" under the common law and under statutory definition found in Wis. Stat. § 948.01(7)(e). The court of appeals found no material difference between the two for the images at issue in this case. The evidence was sufficient to convict under either.

Edwards presents three issues for review, but all amount to a fact-intensive request for error correction. This Court should deny the petition.

ARGUMENT

This Court should deny the petition.

Edwards presents three issues for review. She "will argue that 2019 WI ACT 16 . . . broadened the definition of the term 'lewd exhibition of intimate parts.'" (Pet. 4, 8.) She argues that the evidence was insufficient to convict her. (Pet. 4.) And she argues she should receive a new trial because trial counsel failed to object to the jury instruction which improperly instructed the jury on the definition of lewd. (Pet. 4.) She then admits that only the first two issues are worthy of review. (Pet. 5.) Without referencing any of the criteria for review from Wis. Stat. § (Rule) 809.62(1r), she claims that this Court could "develop the law on [sic] whether the case law definitions of the term are essentially the same," and because people can possess child sex abuse materials for a long time, this issue could recur. (Pet. 5.) She then claims review of the sufficiency of the evidence in this case "matters not only to defendant, but defendants in the future." (Pet. 5.) She is incorrect on both counts, and she does not explain how or why

review of these issues will accomplish these criteria for review.

A. The court of appeals correctly determined that the common law and statutory definitions are not materially different.

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: . . . 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*, this Court observed that there is no one definition of lewd established in case law. *State v. Petrone*, 161 Wis. 2d 530, 561, 468 N.W.2d 676 (1991), *overruled in part on other grounds by State v. Greve*, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479. 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.* This 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.

"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.

In *Petrone*, the supreme court defined "lewd" based in part on its consideration of federal case law. *Petrone*, 161 Wis. 2d at 561–62. 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.

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 (May7,2019),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 this case, the court of appeals "rejected Edwards' interpretation of the common law definition" that lewd required both that the victim was posed as a sex object and that the photograph placed an unusual or unnatural focus on her intimate parts. (Pet-App. 20.) It compared the two definitions and held that "[b]oth the statutory and the common law definitions require that the jury find, pertinent to the sexually suggestive determination, that there is an unnatural or unusual focus on the child's intimate parts or that the child is posed as a sex object in some other manner." (Pet-App. 20–21.) The only material difference was not relevant to this case—the depiction of less than fully opaque clothing—so "[f]or purposes of this appeal, we conclude that the two definitions are materially the same," so trial counsel

was not deficient for failing to object to the jury instructions. (Pet-App. 21.)

Edwards does not meaningfully argue why the court of appeals was wrong, other than repeating its argument that the statute arguably broadened the definition of lewd. (Pet. 9.) She also reiterates her disagreement with the court of appeals' conclusion that the common law definition did not require both being posed as a sex object and the photo has an unusual or unnatural focus on the child's intimate parts. (Pet. 10.) This is nothing more than a request for error correction. This Court is "not, primarily, an error-correcting tribunal, and [it] normally hear[s] only those cases that present something more than just an error of law." *State ex rel. DNR v. Wis. Ct. of Appeals, Dist. IV*, 2018 WI 25, ¶ 43, 380 Wis. 2d 354, 909 N.W.2d 114 (footnote omitted).

Because Edwards is incorrect on this issue, it also forecloses the merits of reviewing her third issue, whether she received ineffective assistance of counsel because the definitions were not meaningful different for her case.

B. The court of appeals correctly determined that the evidence was sufficient to convict Edwards under the common law definition of lewd.

Because Wis. Stat. § 948.01(1t) was not in effect at the time of Edwards' offense, the parties and court of appeals agreed that the definition of lewd should have been assessed against the common law definition in *Petrone*. (Pet-App. 12.) It went over *Petrone* and held that the State was not require to "prove both that the child is posed as a sex object and that there is an unnatural or unusual focus on the child's intimate parts. Rather, showing that there is an unnatural or unusual focus on the child's intimate parts is one way of proving that the child is posed as a sex object." (Pet-App. 12–14.) It noted

that cases after *Petrone* and the prior jury instruction supported this reading. (Pet-App. 15.)

Having clarified what the law was, it turned to the photographs at issue. (Pet-App. 16–18.) The photos undisputedly showed the victim's intimate parts. (Pet-App. 16.) It found a reasonable jury could determine that the photos were sexually suggestive:

> Specifically, a reasonable jury could have found that the image showing A.B. standing naked painting the wall of a living room, an action that is not ordinarily performed while naked, with her breasts and buttocks plainly visible, "unnaturally" or "unusually" drew attention to, or focused on, A.B.'s intimate parts. . . . A reasonable jury could also have found that A.B. was posed as a sex object in other respects: she was placed in the center of the frame, with her intimate parts exposed, performing a mundane task normally performed with clothes on, and her nakedness in this context may have reasonably signified that she was posed as a sex object.

(Pet-App. 17.)

Therefore, the court of appeals held that Edwards did not meet the high burden to show that no reasonable finder of fact could have found her guilty. (Pet-App. 17–18.)

Edwards merely disagrees. (Pet. 12–13.) Again, this is merely asking for error correction. *DNR,* 380 Wis. 2d 354, ¶ 43.

She asks this Court to declare that the photos at issue, as a matter of law, are not lewd. That is exactly the sort of fact-intensive inquiry that is unlikely to matter in other cases that makes review unwarranted in this case.

CONCLUSION

This Court should deny the petition.

Dated this 9th day of April 2025.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

John D. Flynn
JOHN D. FLYNN
Assistant Attorney General
State Bar #1096413

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7324
(608) 294-2907 (Fax)
flynnjd@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 2,129 words.

Dated this 9th day of April 2025.

Electronically signed by:

John D. Flynn
JOHN D. FLYNN
Assistant Attorney General

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 9th day of April 2025.

Electronically signed by:

John D. Flynn
JOHN D. FLYNN
Assistant Attorney General