COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2447-CR **Cir. Ct. No. 01CF000377**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH E. HEIFORT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Affirmed*.

Before Deininger, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Joseph Heifort appeals a judgment of conviction and an order denying his motion for postconviction relief. The issues relate to sufficiency of the evidence and ineffective assistance of counsel as it relates to the jury instructions. We affirm.

¶2 Heifort was convicted of one count of repeated sexual assault of the same child and one count of possession of child pornography. Only the pornography count, under WIS. STAT. § 948.12 (1999-2000),[1] is at issue in this appeal. That statute makes it a crime to possess undeveloped film of a child engaged in "sexually explicit conduct" when the defendant knows that he or she possesses the material, knows the character and content of the sexually explicitly conduct shown in the material, and knows or reasonably should know that the child engaged in the sexually explicit conduct has not attained the age of eighteen years. The term "sexually explicit conduct" is defined, as relevant to this case, as "actual or simulated … [l]ewd exhibition of intimate parts." WIS. STAT. § 948.01(7)(e). "Intimate parts" is defined as "the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being." WIS. STAT. § 939.22(19).

¶3 At trial, a child testified that on a day when she was fourteen years old Heifort took "about three" photographs of her. The photographs themselves were apparently not in evidence.[2] The girl testified that the pictures were taken in a small bus fitted with two bunk beds on both sides. She was standing in the aisle of the bus, with her hands on the railings of the beds, a little higher than her shoulders. She had her "underwear" on, but no "top or bra," and her breasts were exposed. Heifort was "standing a couple feet away" from her when he took the

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] We note that Heifort does *not* argue that the evidence was insufficient to convict him of possession of child pornography because no images were introduced into evidence. We therefore do not address that issue.

pictures. She did not state where the camera was pointing. Heifort argues that this evidence was insufficient.

¶4 When reviewing the sufficiency of the evidence to support a conviction, we will affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶5 Heifort directs our attention to the element requiring that the undeveloped film contain images of lewd exhibition of intimate parts. He first argues that the image on the film would not meet "the legal standard" for lewdness, in light of the definition of "lewd" contained in ***State v. Petrone***, 161 Wis. 2d 530, 561, 468 N.W.2d 676 (1991). In effect, Heifort asks this court to consider a definition of "lewd" that was not part of the instruction given to the jury. However, it is implicit in the concept of "reviewing a jury verdict" that we review the verdict in light of the instructions that were *actually given*. If we reviewed a verdict in light of instructions that were not given, we would no longer be reviewing the verdict that was actually reached by the jury. Instead, we would be making an observation about the validity of a verdict if other instructions had been given. Furthermore, if we were to consider instructions not given when reviewing the verdict, our review would evade the waiver rule of ***State v. Schumacher***, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988) (court of appeals lacks power to review unobjected-to jury instructions). However, defendants may not evade ***Schumacher*** simply by arguing after trial that the evidence was insufficient under an instruction that the defendant thinks should have been given. Therefore, we confine our analysis to the instruction that was actually given.

¶6 In Heifort's case, the jury was given no definition of the word "lewd." Therefore, we turn to the ordinary definitions that jurors would likely bring to the word. One dictionary provides as the non-obsolete meanings: "sexually unchaste or licentious" and "suggestive of or tending to moral looseness: inciting to sensual desire or imagination." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1301 (unabr. ed. 1993). We conclude that a reasonable jury could have found, based on the child's account, that the photos Heifort took contained images that showed her naked breasts at a fairly close distance. Applying the above definitions, we conclude a reasonable jury could then have found that such images satisfied one or more of the above definitions.

¶7 Heifort next argues that the evidence was insufficient because the images on the film did not contain an exhibition of an "intimate part." Relying on case law, Heifort contends that "breast" is not included in the definition of "intimate part." This argument fails because, as explained above, sufficiency of the evidence analysis is not concerned with the legally correct definition of a term, but with the words and definitions contained in the actual instructions given. In Heifort's case, the jury was specifically instructed that the breast is an intimate part. Therefore, his sufficiency-of-the-evidence argument on this point is meritless.

¶8 Heifort next argues that his trial counsel was ineffective. The circuit court denied this challenge without a hearing. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). Whether a motion

alleges facts which, if true, would entitle a defendant to relief is a question of law that we review *de novo*. ***Id.***

¶9 Heifort argues that his counsel should have objected to the instruction that the breast is an "intimate part." Heifort argues that under controlling case law the breast is *not* an intimate part. He relies on this passage from ***Petrone***:

> After examining cases interpreting similar child pornography laws and the term "lewd," we conclude that no one definition has been established for "lewd." 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, 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.

Petrone, 161 Wis. 2d at 561. Heifort argues that the third and fourth sentences of this passage establish that "lewdness" requires an exhibition of genitals or pubic area, which are terms that do not encompass breasts. The State responds that the defendant in ***Petrone*** was charged under a different statute with the following language: "lewd exhibition of the genitals or pubic area of any person." *See* ***id.*** at 558-59. Thus, the ***Petrone*** court was merely repeating a statutory requirement that was in effect at the time; the court did not purport to establish a standard independent of the statute. In other words, if the supreme court were writing about the statute in this case, the court would say "the photograph must visibly display

the child's intimate parts, as defined in WIS. STAT. § 939.22(19)." In sum, we agree with the State's interpretation of ***Petrone***.

¶10 Heifort attempts to overcome the State's argument by relying on the pattern jury instruction, WIS JI—CRIMINAL 2146, which he asserts continued to use the language about "genitals or pubic area," even after the statute was amended to say "intimate parts." We note, however, that the most recent version of the instruction, WIS JI—CRIMINAL 2146A, now uses "intimate part," rather than "genitals or pubic area." The Comment to the instruction indicates that it was amended to make "corrections," including language Heifort relies on. *See* Comment to WIS JI—CRIMINAL 2146A and n.6.

¶11 Finally, Heifort argues that the current definition of "intimate parts" should not have been used in the instruction because, as provided in the introductory portion of WIS. STAT. § 948.01, the definitions provided there apply "unless the context of a specific section manifestly requires a different construction." He argues that the definition of "intimate parts" requires a different construction when used in the child pornography statute in order to comply with ***Petrone***. However, we have already explained why ***Petrone*** does not reflect current law in this regard.

¶12 For these reasons, we conclude that the trial court did not err by denying, without a hearing, Heifort's claim that his counsel was ineffective by failing to object to the instruction telling the jury that the breast is an "intimate part."

¶13 As a second ground of ineffective assistance, Heifort argues that his counsel should have moved to dismiss the possession of child pornography count, before it went to the jury, for lack of evidence. This argument brings us back to

the question of sufficiency of the evidence, and we have already concluded that the evidence was sufficient under the jury instruction given. Accordingly, there would have been no merit to a motion to dismiss for lack of evidence.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (2001-02).