COURT OF APPEALS
DECISION
DATED AND FILED

October 31, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2375-CR **Cir. Ct. No. 99-CF-240**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID ENTIS REES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County: ANDREW P. BISSONNETTE, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 LUNDSTEN, J. David Entis Rees appeals a judgment convicting him of possessing child pornography contrary to WIS. STAT. § 948.12 (1997-98).[1]

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Rees argues that photographs in his possession do not meet the statutory standard for child pornography. We disagree and affirm the judgment.

Background

¶2 The facts in this case are undisputed. On August 11, 1999, Rees possessed several photographs of nude children. Rees was charged with one count of possession of child pornography. Following a bench trial, the trial court found that three of the photos showed a "lewd exhibition of intimate parts" and convicted Rees of one count of possessing child pornography.

Discussion

¶3 WISCONSIN STAT. § 948.12, entitled Possession of child pornography, states, in relevant part:

> Whoever possesses any undeveloped film, photographic negative, photograph, motion picture, videotape or other pictorial reproduction or audio recording of a child engaged in sexually explicit conduct under all of the following circumstances is guilty of a Class E felony:
>
> (1) The person knows that he or she possesses the material.
>
> (2) The person knows the character and content of the sexually explicit conduct shown in the material.
>
> (3) The person knows or reasonably should know that the child engaged in sexually explicit conduct has not attained the age of 18 years.

¶4 At trial, Rees stipulated that he knowingly possessed the photographs at issue here. On appeal, Rees does not contest that he knew the character and content of the photographs. Nor does Rees contest that he knew or should have known that the photographs depicted persons under the age of

eighteen. Therefore, the sole issue on appeal is whether the images in the photographs depict sexually explicit conduct.

¶5 "Sexually explicit conduct" is defined as a "[l]ewd exhibition of intimate parts." WIS. STAT. § 948.01(7)(e). "Lewd exhibition" is not defined further in the relevant statutes, but the supreme court has stated 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, 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.

State v. Petrone, 161 Wis. 2d 530, 561, 468 N.W.2d 676 (1991). Thus, we must determine whether the photographs in Rees's possession visibly display a child's intimate parts in a way that unnaturally or unusually focuses on the child's intimate parts.

¶6 The parties disagree on the appellate standard of review. Rees argues that our review should be *de novo*, citing ***United States v. Amirault***, 173 F.3d 28, 32-33 (1st Cir. 1999). In ***Amirault***, the court concluded that *de novo* review in a child pornography case is required to ensure that the First Amendment has not been improperly infringed, rejecting the clearly erroneous standard employed in ***United States v. Wiegand***, 812 F.2d 1239, 1244 (9th Cir. 1987). ***Amirault***, 173 F.3d at 32-33. In addition, Rees states that "a determination that

speech constitutes libel, obscenity, fighting words, child pornography, or something else categorically excluded from First Amendment protections requires plenary review on appeal to ensure that protected speech is not infringed," citing ***Bose Corp. v. Consumers Union of U.S., Inc.***, 466 U.S. 485, 504-05 (1984), a product disparagement case. Rees contends that applying *de novo* review in this case is consistent with the practice in Wisconsin of independently reviewing the application of constitutional principles to undisputed facts. *See* ***State v. Patricia A.P.***, 195 Wis. 2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995).

¶7 The State responds that this case is best reviewed as a sufficiency-of-the-evidence claim. The State reasons that because Rees challenges only whether the pictures fall within conduct prohibited by the child pornography statute, and does not challenge the child pornography law on First Amendment grounds, Rees's argument concerns whether the evidence is sufficient to sustain his conviction. The State quotes ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990), to set out this court's review of a sufficiency-of-the-evidence challenge:

> [A]n appellate court may not reverse a conviction 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.

Id. at 501.

¶8 In the alternative, the State contends that this court should uphold the findings of the trial court unless clearly erroneous, because "whether the photographs involve a 'lewd exhibition' under the child pornography statute is a question of fact." The State quotes ***Wiegand***, 812 F.2d at 1244, for support: "The

question of whether the pictures [of alleged child pornography] fall within the statutory definition is a question of fact as to which we must uphold the district court's findings unless clearly erroneous." Moreover, the State argues that a deferential standard of review is consistent with the supreme court's directive that "the court may remind the jurors that they should use these [previously enumerated] 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.

¶9 Our review of the relevant case law has unearthed no controlling authority on which standard to employ when reviewing a determination that photographs depict a lewd exhibition of a child's genitalia. Because we would affirm under any of the proposed standards of review, we conclude it is unnecessary to resolve this dispute.

¶10 The trial court found that three of the photographs in Rees's possession depict a lewd exhibition of a child's genitalia. We need not review and discuss all three photographs to sustain Rees's conviction; one is sufficient. We conclude that Exhibit 3 meets the statutory standard.

¶11 Exhibit 3 is a photograph depicting a prepubescent girl climbing a tree while only wearing shoes. The girl is shown from below. The girl's image nearly fills the photo. The girl's buttocks and genitalia are at the center of the photo. Her right leg is raised up at a ninety-degree angle, exposing her labia to view. It is apparent the photograph was taken with the aid of a flash because the tree and the girl's left arm, which is over her head, are poorly lit when contrasted with the illuminated lower half of the girl's body. We conclude that the photograph unnaturally focuses on the girl's genitalia and buttocks, constituting a

lewd exhibition of a child's intimate parts. *Cf.* ***United States v. Wolf***, 890 F.2d 241, 243 (10th Cir. 1989) ("[The girl's] legs are spread apart, exposing her genital region. The primary focus of light in the photograph is the victim's genitals; the victim's head and the other background is barely lit."); ***United States v. Knox***, 32 F.3d 733, 747 (3rd Cir. 1994) ("[T]he minor subjects … were shown specifically spreading or extending their legs to make their genital and pubic region entirely visible to the viewer.").

¶12 Applying a *de novo* standard of review, we would affirm. Because we would affirm under a *de novo* review, it necessarily follows that we would affirm under the more restricting standards of review advocated by the State.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.