COURT OF APPEALS
DECISION
DATED AND FILED

January 27, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1615-CR **Cir. Ct. No. 2009CF3731**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSE O. GONZALEZ-VILLARREAL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Curley, P.J., Kessler, J., and Thomas Cane, Reserve Judge.

¶1 CURLEY, P.J. Jose O. Gonzalez-Villarreal appeals the judgment convicting him of five counts of possession of child pornography, contrary to WIS.

STAT. § 948.12(1m) (2009-10).[1] Gonzalez-Villarreal makes five arguments on appeal: (1) his right to a speedy trial was violated; (2) unreasonable discovery restrictions violated his right to equal protection; (3) the trial court erred in admitting "other acts" evidence at trial; (4) the trial court erred in not submitting Gonzalez-Villarreal's chosen jury instruction on possession; and (5) the trial court erroneously exercised its discretion at sentencing. We reject his arguments and affirm.

BACKGROUND

¶2 In August 2009, the State charged Gonzalez-Villarreal with five counts of child pornography. The charges stemmed from the recovery of more than 1100 images of suspected child pornography and child erotica from his computer's hard drive following the execution of a search warrant.[2] According to the complaint, the search warrant was issued after Milwaukee police discovered that an internet user with the email address "alvawillie@hotmail.com" had posted images of child pornography to Google Groups, an internet discussion group, and further investigation—including investigation of social networking sites and other places where the email address was used—linked Gonzalez-Villarreal to the "alvawillie@hotmail.com" address. The search of Gonzalez-Villarreal's hard drive revealed not only the aforementioned images of child pornography, but also images of Gonzalez-Villarreal in the company of boys who appeared to be about five to twelve years of age, and "a folder showing a connection to the email

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] The complaint states that over 1400 images were recovered from Gonzalez-Villarreal's hard drive, but at trial the investigating detective testified to approximately 1100 images.

address that originally uploaded the suspected child pornography to Google Groups."

¶3 Gonzalez-Villarreal pled not guilty to the charges and the case went to trial. Although the State charged Gonzalez-Villarreal with just five counts of child pornography, the State sought to introduce the other images recovered from his hard drive to show that Gonzalez-Villarreal knew that child pornography was stored on his computer. The trial court allowed the evidence over Gonzalez-Villarreal's objection, and the jury found him guilty.

¶4 Gonzalez-Villarreal now appeals. Additional facts will be developed as necessary below.

ANALYSIS

¶5 Gonzalez-Villarreal makes five arguments on appeal: (1) his right to a speedy trial was violated; (2) unreasonable discovery restrictions violated his right to equal protection; (3) the trial court erred in admitting "other acts" evidence at trial; (4) the trial court erred in not submitting Gonzalez-Villarreal's chosen jury instruction on possession; and (5) the trial court erroneously exercised its discretion at sentencing.[3] We address each argument in turn.

[3] We have attempted to discern and address the issues Gonzalez-Villarreal raises on appeal to the best of our ability; however, doing so was challenging because the appellant's brief was very poorly written and in some places incomprehensible. To the extent that we have not addressed an issue, we have determined that it is not dispositive. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

(1) Gonzalez-Villarreal's right to a speedy trial was not violated.

¶6 Gonzalez-Villarreal first argues that his constitutional right to a speedy trial was violated. "Whether a defendant has been denied the right to a speedy trial is a constitutional question that this court reviews *de novo*." *See* ***State v. Leighton***, 2000 WI App 156, ¶5, 237 Wis. 2d 709, 616 N.W.2d 126. While our review of the legal question is *de novo*, the trial court's underlying findings of historical fact will be upheld unless they are clearly erroneous. *See* ***id.***

¶7 To determine whether a defendant has been denied the constitutional right to a speedy trial, we must consider four factors enumerated by the United States Supreme Court in ***Barker v. Wingo***, 407 U.S. 514 (1972): the length of the delay; the reason for the delay, that is, whether the government or the defendant is more to blame for the delay; whether the defendant asserted the right to a speedy trial; and whether the delay resulted in any prejudice to the defendant. *See* ***Leighton***, 237 Wis. 2d 709, ¶6. The four factors are balanced on a case-by-case basis, with no single factor representing either a necessary or a sufficient condition to the finding of a deprivation of the right to a speedy trial. *See* ***Barker***, 407 U.S. at 533.

¶8 In this case, there is no dispute that Gonzalez-Villarreal repeatedly asserted his right to a speedy trial; therefore, we will evaluate: (a) the length of the delay; (b) the reasons for the delay; and (c) any resulting prejudice to Gonzalez-Villarreal. *See* ***Leighton***, 237 Wis. 2d 709, ¶6.

a. The length of the delay.

¶9 Turning to the first factor for consideration, the length of the delay, we must first make a threshold determination that the length of the delay is

presumptively prejudicial before we inquire about the remaining factors. *See* ***id.***, ¶7. A finding that a delay is presumptively prejudicial "do[es] not place an additional burden on the state to prove the negative, lack of prejudice." ***State v. Lemay***, 155 Wis. 2d 202, 212-13, 455 N.W.2d 233 (1990). Rather, such a finding "merely triggers further review of the allegation under the other three ***Barker*** factors." ***Lemay***, 155 Wis. 2d at 212-13.

¶10 The State and Gonzalez-Villarreal agree that the three year and nine month interval between the filing of the complaint and trial is presumptively prejudicial.[4] *See* ***Doggett v. United States***, 505 U.S. 647, 652 n.1 (1992) (as a general rule, a twelve month delay from charging to trial may be considered presumptively prejudicial). Consequently, we must examine the remaining ***Barker*** factors.

b. The reasons for the delay.

¶11 Turning to the next factor, the reason advanced for the delay, we must ask, "who caused the delay?" *See* ***Norwood v. State***, 74 Wis. 2d 343, 354, 246 N.W.2d 801 (1976). If the delay is attributed to the actions of the defendant, that period of time is not considered in deciding whether he has been denied a speedy trial. *See* ***id.*** Moreover, "preconviction delay is not to be weighed heavily against the state if it was not intentional and not motivated by a desire to

[4] The parties characterize the interval as being three years and eleven months. That was the interval between charging and sentencing, however, not between charging and trial. Trial took place on May 29-30, 2013, just over three years and nine months after the criminal complaint was filed. *See* ***State v. Leighton***, 2000 WI App 156, ¶8, 237 Wis. 2d 709, 616 N.W.2d 126 (length of delay we consider is between charging and trial).

disadvantage the defendant in preparation of his or her defense." ***State v. Allen***, 179 Wis. 2d 67, 77, 505 N.W.2d 801 (Ct. App. 1993).

¶12 As best as we can tell, Gonzalez-Villarreal outlines two ways in which the State caused the delay between charging and trial: continually failing to answer his discovery demands, both as a general matter and specifically by failing to disclose a copy of his hard drive for the defense expert to evaluate; and moving to disqualify trial counsel, which precipitated an interlocutory appeal. We disagree with Gonzalez-Villarreal on all points raised.

(i) Discovery demands.

¶13 Gonzalez-Villarreal's argument that the State generally refused to answer his discovery demands is inadequate and must be rejected. *See, e.g.*, ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). Of the many citations to the record Gonzalez-Villarreal points to as proof of the State's allegedly flagrant refusal to provide discovery, not a single one supports his contentions. Indeed, many of his record citations are to motions he filed, which are not evidence of anything other than the fact that he filed motions. *See* ***Nelson v. Schreiner***, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991) (assertions of fact in brief that are not part of the record will not be considered on appeal). We decline to further elaborate on the myriad inadequacies of Gonzalez-Villarreal's brief in developing this argument and conclude that we will not consider it further. *See, e.g.*, ***Pettit***, 171 Wis. 2d at 646-47.

¶14 Additionally, any specific delays that Gonzalez-Villarreal claims were necessitated by the State's failure to disclose a copy of his hard drive for his expert are unavailing. There is no evidence that the State denied Gonzalez-Villarreal's expert access to his hard drive; rather, as is explained quite thoroughly

in the State's brief, the State merely required the expert to review the hard drive within the confines of the trial court's protective order. Gonzalez-Villarreal argues that complying with the protective order caused him financial hardship, as his expert allegedly charged over $50,000 to review the hard drive in Milwaukee, compared with about $5000 to view it in Chicago. But, as we will later discuss, there is nothing in the record to support this claim. In any event, Gonzalez-Villarreal's argument fails to sustain an argument that the State was responsible for the delay, and we must therefore reject it.

(ii) Motion to disqualify counsel.

¶15 With respect to Gonzalez-Villarreal's interlocutory appeal stemming from the State's motion to disqualify counsel, the trial court proceedings were stayed from June 7, 2011, through September 18, 2012—a period of over fifteen months. The State had requested that the trial court remove Attorney Michael Knoeller as defense counsel and appoint new counsel due to concern that counsel had conflicted himself out of the case. This court summarized the State's position as follows:

> The State explained that its motion for disqualification was based on its understanding that Attorney Knoeller was in a position of conflict because Gonzalez-Villarreal made a potentially incriminating statement during the recorded interview. Because Attorney Knoeller acted as Gonzalez-Villarreal's translator during that interview, the State reasoned, Attorney Knoeller was in a position where he could potentially have to act as a witness in his client's case.

State v. Gonzalez-Villarreal, 2012 WI App 110, ¶3, 344 Wis. 2d 472, 824 N.W.2d 161.

¶16 While Gonzalez-Villarreal argues that this period of delay should be charged against the State because he was allegedly compelled to file the interlocutory appeal by the prosecutor's "attempt to strip [Gonzalez-Villarreal] from his chosen representation," we disagree. The fact that Gonzalez-Villarreal was ultimately successful in his interlocutory appeal does not, without more, mean that the State's actions were motivated by a desire to disadvantage the defendant in preparation of his defense. Rather, the State was not able to meet the high burden of proving that Attorney Knoeller's actions made him a necessary witness at trial. *See* ***Gonzalez-Villarreal***, 344 Wis. 2d 472, ¶12 (the State had to show that Attorney Knoeller was a "necessary" witness to the interview's content); *see also* ***United States v. Loud Hawk***, 474 U.S. 302, 316 (1986) (The time for an interlocutory appeal, even by the government, is generally not chargeable against the State.).

c. Prejudice to Gonzalez-Villarreal.

¶17 In considering the final factor for review, whether the delay resulted in prejudice to the defendant, we consider three interests that the speedy trial right is designed to protect: preventing oppressive pretrial incarceration; minimizing the accused's anxiety and concern; and limiting the possibility that the defense will be impaired. *See* ***Barker***, 407 U.S. at 532. None of these three interests was impacted by the delay in this case.

¶18 Regarding the first of the three interests we consider, *see* ***id.***, Gonzalez-Villarreal does not appear to argue that there was any oppressive pretrial incarceration. Nor should he; he was released on $500 cash bail on the same date the State filed its criminal complaint, and remained out on cash bail until after the court imposed sentence. Thus, there was no oppressive pretrial incarceration.

¶19 With regard to the second interest, Gonzalez-Villarreal does contend that he suffered from the anxiety and concerns of the impending trial and the conditions of his bail; however, his argument is insufficiently developed. Gonzalez-Villarreal's mere assertions of anxiety and concern, without more, are not enough to show more than minimal prejudice. *See* ***State v. Urdahl***, 2005 WI App 191, ¶35, 286 Wis. 2d 476, 704 N.W.2d 324 ("without more than the bare fact of unresolved charges – which exists in every criminal case – we view the prejudice to the second interest as minimal").

¶20 With respect to the third interest, impairing his defense, Gonzalez-Villarreal's argument again misses the mark. Specifically, he claims that one key defense witness, Milwaukee County Law Librarian Rebecca Knutsen, died during the delay of trial, and another key witness, Milwaukee County Law Librarian Kate Roherty, "left the area." Gonzalez-Villarreal's argument regarding Roherty is totally disingenuous as our review of the record revealed that Roherty worked in Waukesha. As for Knutsen, Gonzalez-Villarreal intended to call her to testify that she encountered a great deal of unwanted spam in her position as a law librarian. This would have allegedly supported Gonzalez-Villarreal's defense theory that the child pornography on his hard drive was nothing more than unwanted spam.

¶21 We agree with the State that "Gonzalez-Villarreal can hardly claim that Ms. Knutsen was central to his defense." As the trial court concluded, Gonzalez-Villarreal could have made his point with any number of witnesses. In other words, Knutsen's death did not prevent counsel from finding a witness who worked regularly with computers to testify to the fact that a person can get unwanted spam on his or her computer.

¶22 In sum, we are satisfied that Gonzalez-Villarreal's right to a speedy trial was not violated. The periods of delay are primarily attributable to the defense. With respect to the delay caused by discovery disputes, the State sought to enforce the trial court's protective order and ultimately safeguard the sensitive information on the hard drive to prevent further victimization of children. There was no evidence of intent to disadvantage Gonzalez-Villarreal's preparation for trial. Furthermore, there is no evidence that Gonzalez-Villarreal's defense was impaired by the delay.

(2) Gonzalez-Villarreal's right to equal protection was not violated.

¶23 Gonzalez-Villarreal next argues that unreasonable discovery restrictions violated his right to equal protection. Gonzalez-Villarreal appears to advance two specific arguments: the State failed to disclose the contents of his hard drive; and the trial court erred in denying his request to modify the order to allow his expert to examine a copy of the hard drive at his own facilities in Chicago.

¶24 Regarding Gonzalez-Villarreal's argument that the State failed to disclose the contents of the hard drive, we note that his citations to the record do not support him. Indeed, one of his citations is to a page in the record that does not exist, and another is merely to argument at a motion hearing. Also, his argument that the State failed to disclose evidence in accordance with the law is insufficiently developed and we will not consider it further. *See* ***State v. McMorris***, 2007 WI App 231, ¶30, 306 Wis. 2d 79, 742 N.W.2d 322 ("we may choose not to consider arguments unsupported by references to legal authority, arguments that do not reflect any legal reasoning, and arguments that lack proper citations to the record").

¶25 Gonzalez-Villarreal's argument that the trial court erred in denying his request to modify the protective order similarly goes nowhere. He argues that because it would have cost his expert only $5000 to review his hard drive at his facility in Chicago but over $50,000 to review the evidence in Milwaukee, the protective order essentially prohibited him from inspecting the evidence and the trial court consequently erred in refusing to modify the order.[5]

¶26 We review the trial court's rulings regarding the protective order for an erroneous exercise of discretion. *See* ***State v. Bowser***, 2009 WI App 114, ¶9, 321 Wis. 2d 221, 772 N.W.2d 666. In other words, we must determine whether the trial court based its decision on relevant facts, applied a proper standard of law, and arrived at a reasonable conclusion "using a demonstrated rational process." *See* ***id.***

¶27 We must reject Gonzalez-Villarreal's argument because the decision to deny Gonzalez-Villarreal's motion is not in the record. While Gonzalez-Villarreal generally directs us to the transcript of a March 2013 status conference, it does not appear that the trial court ruled on any motions during that status

[5] We note that there is no support in the record for Gonzalez-Villarreal's $5000 estimate. Gonzalez-Villarreal's uses the number "$5000" numerous times in his brief to refer to the cost of having his expert review the hard drive at his own facility in Chicago. Unfortunately, none of his record citations prove this number. This court independently reviewed the record and found a far different estimate: $15,208.75. This estimate came from the expert's letter to Gonzalez-Villarreal's counsel explaining that his fees would be substantially less in Chicago than Milwaukee. It appears from this letter that the $5000 refers not to the expert's total cost, but the outstanding balance on Gonzalez-Villarreal's account. Gonzalez-Villarreal's repeated use of a grossly inaccurate estimate is disingenuous and frustrates both this court and the judicial process. *See* ***Questions, Inc. v. City of Milwaukee***, 2011 WI App 126, ¶15 n.6, 336 Wis. 2d 654, 807 N.W.2d 131.

conference.[6] The State points out that the hearing in which Gonzalez-Villarreal's motion was denied took place two years earlier, in March 2011, and there is no transcript of the hearing in which Gonzalez-Villarreal's motion was denied. Gonzalez-Villarreal does not refute these claims in his reply. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979). When a record is incomplete, we assume that the missing material supports the decision under attack. *See* ***State v. Benton***, 2001 WI App 81, ¶10, 243 Wis. 2d 54, 625 N.W.2d 923. Moreover, as the appellant, Gonzalez-Villarreal had the burden of ensuring a complete record. *See* ***Manke v. Physicians Ins. Co. of Wis.***, 2006 WI App 50, ¶60, 289 Wis. 2d 750, 712 N.W.2d 40. As we explained in ***Manke***, the law requires that we uphold the trial court in this situation:

> [T]he record does not contain a transcript of the trial…. As the appellant[s], it is the Mankes' responsibility to present a complete record for the issues on which they seek review, and we assume that any missing material that is necessary for our review supports the circuit court's determination. We therefore assume a transcript of the trial would support the circuit court's decision to retry the issue of causation as well as negligence, and we affirm this decision without further discussion.

Id. (internal citation omitted). Consequently, because we are unable to review the transcript of the trial court's decision, we must assume the missing material in the record supports the trial court's decision, and we reject Gonzalez-Villarreal's argument on appeal.

[6] We further note that during the March 2013 status conference that Gonzalez-Villarreal references, defense counsel told the court that he had obtained *two* estimates for expert review of Gonzalez-Villarreal's hard drive: one based in Chicago who charged over $50,000, and one based in Milwaukee who charged approximately $17,000. Defense counsel argued that both experts were cost prohibitive.

(3) The trial court properly exercised its discretion when it admitted "other acts" evidence.

¶28 Gonzalez-Villarreal's third argument on appeal is that the trial court erred in admitting "other acts" evidence—namely, testimony elicited during his cross-examination and from a rebuttal witness that over 1100 images of child pornography were recovered from his hard drive. Before trial, the State sought to admit the other acts evidence to prove that Gonzalez-Villarreal had knowledge that pornography was stored on his computer and that the images did not appear on his computer by accident through spam or a virus. The State offered to hold off admitting the other acts evidence in its case in chief. The trial court determined that the State could admit the other acts into evidence on rebuttal if Gonzalez-Villarreal claimed "it's by mistake that somehow this wound up on his hard drive or computer."

¶29 At trial, the prosecutor introduced evidence of the other images after Gonzalez-Villarreal testified that he did not know how the pornography appeared on his computer. The prosecutor questioned how so many similar images could have appeared on his computer accidentally, without his knowledge. The prosecutor then called Detective Richard McQuown, who testified that he viewed approximately 1100 images of child pornography and child erotica on Gonzalez-Villarreal's computer. McQuown further explained that, out of the more than 1100 images, he chose five representative images to charge Gonzalez-Villarreal. At the close of the evidence, the trial court gave a cautionary instruction with respect to the limited use of the other acts evidence.

¶30 Gonzalez-Villarreal now argues that the trial court erred in admitting the other acts evidence. "WISCONSIN STAT. § 904.04(2)(a) prohibits the admission of evidence of a defendant's other bad acts to show that the defendant has a

propensity to commit crimes." ***State v. Marinez***, 2011 WI 12, ¶18, 331 Wis. 2d 568, 797 N.W.2d 399. "[O]ther-acts evidence that is offered for a purpose other than the prohibited propensity purpose is," however, "admissible if it is relevant to a permissible purpose and is not unfairly prejudicial." ***Id.***

¶31 In ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), the supreme court articulated a three-step test to determine whether other acts evidence is admissible:

> (1) Is the other acts evidence offered for an acceptable purpose under WIS. STAT. § (RULE) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
>
> (2) Is the other acts evidence relevant, considering the two facets of relevance set forth in WIS. STAT. § (RULE) 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.
>
> (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence? *See* WIS. STAT. § (RULE) 904.03.

Sullivan, 216 Wis. 2d at 772-73 (footnote omitted).

¶32 We review the trial court's decision to admit other acts evidence under an erroneous exercise of discretion standard. ***State v. Kimberly B.***, 2005 WI App 115, ¶38, 283 Wis. 2d 731, 699 N.W.2d 641. The question on review is not whether we would have allowed admission of the evidence in question. ***Id.*** Instead, if the trial court "'examined the relevant facts; applied a proper standard

of law; and, using a demonstrative rational process, reached a conclusion that a reasonable judge could reach,'" we will affirm its decision. ***Id.*** (citation omitted).

¶33 Turning to the first of the three ***Sullivan*** factors, we first conclude that the evidence was offered for an acceptable purpose. "Th[e] first step in the ***Sullivan*** analysis is not demanding." ***Marinez***, 331 Wis. 2d 568, ¶25. "WISCONSIN STAT. § 904.04(2)(a) contains an illustrative, and not exhaustive, list of some of the permissible purposes for which other-acts evidence is admissible." ***Marinez***, 331 Wis. 2d 568, ¶18. "The purposes for which other-acts evidence may be admitted are 'almost infinite' with the prohibition against drawing the propensity inference being the main limiting factor." ***Id.***, ¶25 (citation omitted). Thus, "[a]s long as the State and [trial] court have articulated at least *one* permissible purpose for which the other-acts evidence was offered and accepted, the first prong of the Sullivan analysis is met." ***Id.***

¶34 Here, the trial court found that the evidence was offered for providing context. *See* ***State v. Payano***, 2009 WI 86, ¶73, 320 Wis. 2d 348, 768 N.W.2d 832 (context can be consequential where it gives jury greater understanding of circumstances in which crime occurred); *see also* ***State v. Pharr***, 115 Wis. 2d 334, 348, 340 N.W.2d 498 (1983) (other acts admissible to complete story by proving immediate context). Approximately 1100 images of child pornography and child erotica were recovered from Gonzalez-Villarreal's computer. The investigating detective chose five images to refer for charges. Thus, discovery of the other images was part of the context and background of the case.

¶35 In addition, the State offered a second, legitimate purpose for introducing the other images—to prove "knowing possession, as opposed to

accidental possession." *See* WIS. STAT. § 904.04(2)(a). While the jury may have believed that Gonzalez-Villarreal did not know how five images of child pornography appeared on his computer, Gonzalez-Villarreal's story became far less believable when Detective McQuown testified that in fact about 1100 such images were stored on Gonzalez-Villarreal's computer.

¶36 Turning to the second prong of the ***Sullivan*** analysis, we conclude the evidence was relevant. This second prong "is significantly more demanding than the first prong but still does not present a high hurdle for the proponent of the other-acts evidence" because of "'[t]he expansive definition of relevancy in WIS. STAT. § 904.01.'" ***Marinez***, 331 Wis. 2d 568, ¶33 (citation omitted). WISCONSIN STAT. § 904.01 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."

¶37 Gonzalez-Villarreal's defense was that he didn't know how the child pornography got on his computer and that it simply could have been spam or a virus. Introducing the fact that over 1100 images of child pornography were recovered from his computer was highly relevant to undermining Gonzalez-Villarreal's credibility. *Cf.* ***State v. Mercer***, 2010 WI App 47, ¶43, 324 Wis. 2d 506, 782 N.W.2d 125.

¶38 Turning to the third prong of the ***Sullivan*** analysis, we conclude that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. With regard to the third prong of the ***Sullivan*** analysis, Gonzalez-Villarreal bears the burden of establishing that the evidence's probative value was substantially outweighed by the danger of unfair prejudice. *See* ***Marinez***, 331 Wis. 2d 568, ¶41. "Because the statute provides for exclusion

only if the evidence's probative value is *substantially outweighed* by the danger of unfair prejudice, [t]he bias, then, is squarely on the side of admissibility." ***Id.*** (emphasis and brackets in original; quotation marks and citation omitted). We resolve close cases "'in favor of admission.'" ***Id.*** (citation omitted). Furthermore, in order to limit the possibility that the jury will convict based on an improper basis, the trial court may provide a limiting/cautionary instruction. ***Id.*** The reviewing court presumes that juries comply with properly given limiting/cautionary instructions and therefore such instructions are an effective means of reducing the risk of unfair prejudice. ***Id.*** The trial court may also limit the risk of unfair prejudice by limiting the evidence and restricting the party's arguments. ***Id.***

¶39 Here, any danger of unfair prejudice was substantially reduced by several factors. First, the trial court limited the presentation of the 1100 other images to rebuttal. *See* ***id.*** The prosecutor complied with the trial court's decision and offered evidence of the other images only after Gonzalez-Villarreal opened the door by testifying that he did not know how the child pornography appeared on his computer. In addition, the State's rebuttal witness, Detective McQuown, described the other images in general terms without giving graphic or inflammatory details. Finally, the trial court's cautionary instruction, which we presume the jury followed, reduced the risk of unfair prejudice. *See* ***id.***

¶40 Therefore, for all of the foregoing reasons, the trial court properly exercised its discretion in admitting evidence of the other child pornography images recovered from Gonzalez-Villarreal's computer.

(4) The trial court did not err by deciding not to include Gonzalez-Villarreal's requested jury instruction on possession.

¶41 Gonzalez-Villarreal next argues that the trial court erred by not giving the jury the instruction he requested regarding possession. Before trial, Gonzalez-Villarreal requested a special instruction on possession, but the trial court rejected it. Gonzalez-Villarreal's requested "possession" instruction provided:

> It is not enough for a person to observe a pornographic image for him to be in possession of that image.
>
> For a person to actually possess that image he … must beyond a reasonable doubt have had the ability to move, alter, copy, [] save, destroy, and otherwise manipulate that image. If he does not, beyond a reasonable doubt, have that ability, then you should find him not guilty."

¶42 At trial, the trial court gave the following instruction, based on WIS JI—CRIMINAL 2146A:

> The following instruction is the substantive instruction that applies to each one of the five counts.
>
> Possession of child pornography, as defined by the Criminal Code of Wisconsin, is committed by one who knowingly possesses or accesses in any way with intent to view any recording, reproduction of an image or a photograph of a child engaged in sexually explicit conduct, knows or reasonably should know that the recording, the reproduction of an image or photograph contained depictions of sexually explicit conduct, and knows or reasonably should know that the child depicted in the material has not attained the age of 18.
>
> Before you may find the defendant guilty of this offense, the state must prove by evidence which satisfied you beyond a reasonable doubt that the following four elements were present:

> One, the defendant knowingly possessed and/or accessed a recording, reproduction of an image or photograph in any way with intent to view it.
>
> Recording means reproduction of an image or photograph or the storage of data representing an image or photograph.
>
> Two, the recording showed a child engaged in sexually explicit conduct.
>
> A child is a person who is under the age of 18 years.
>
> … [S]exually explicit conduct means actual simulated sexual intercourse, oral sexual contact, masturbation and/or lewd exhibition of the genitals, penis, or pubic area.
>
> Three, the defendant knew or reasonably should have known the recording, reproduction of an image or photograph contained depictions of a person engaged in actual or simulated sexually explicit conduct.
>
> Four, the defendant knew or reasonably should have known that the person shown … was under the age of 18.
>
> If you're satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty. If you are not so satisfied, you must find the defendant not guilty.

See ***id.***

¶43 Gonzalez-Villarreal claims that the instruction given by the court misled the jury by equating ownership of the hard drive with possession. He is wrong. The case he cites for this proposition, ***Mercer***, actually acknowledges that data recovered on a defendant's hard drive *is* in fact evidence of possession:

> The issue in this case is whether individuals who purposely *view* digital images of child pornography on the Internet, even though the images are not found in the person's computer hard drive, nonetheless *knowingly possess* those images in violation of WIS. STAT. § 948.12(1m) (2007-08).[] In the last decade, *courts across the country have repeatedly decided that data recovered from a defendant's computer hard drive is evidence of*

> *possession*. The evidence against Benjamin W. Mercer, however, comes from monitoring software that tracked his Internet browsing; there is no evidence that the contraband was in his computer hard drive.

Id., 324 Wis. 2d 506, ¶1 (final emphasis added).

¶44 Gonzalez-Villarreal also, for reasons this court cannot understand, claims that possession should have been more thoroughly explained because doing so "in fact *would have widened the basis upon which a defendant may be found guilty* with certainty rather than gloss over the generic term 'possession.'" (Emphasis added.) We must reject this argument because it does not assist his defense. It is quite clear that an instruction that would have admittedly *widened* the basis for the jury's finding the defendant guilty would not have helped him at trial.

¶45 In sum, because Gonzalez-Villarreal fails to demonstrate how the introduction of his proposed jury instruction would have prevented the jury from determining that he was guilty beyond a reasonable doubt, his claim must be denied.

(5) Gonzalez-Villarreal has forfeited his right to challenge his sentence.

¶46 Gonzalez-Villarreal's final argument on appeal is that the trial court erroneously exercised its discretion at sentencing. Because he did not raise this issue in a postconviction motion, however, we will not consider it on appeal. *See* ***State v. Walker***, 2006 WI 82, ¶30, 292 Wis. 2d 326, 716 N.W.2d 498.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.