COURT OF APPEALS
DECISION
DATED AND FILED

October 31, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1083-CR **Cir. Ct. No. 2011CF186**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY LEE WAYERSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dunn County: WILLIAM C. STEWART, JR., and MAUREEN D. BOYLE, Judges. *Affirmed and cause remanded with directions*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 SEIDL, J. A jury found Gary Wayerski guilty of sixteen felony offenses based on allegations that, over a several-month span, Wayerski had repeated sexual contact with two teenage boys and exposed them to pornography

at his residence. Wayerski raises six issues in this appeal from a judgment entered on the verdicts and from an order denying his postconviction motion.[1] He argues: (1) the circuit court erroneously denied his motion for a change of venue or selection of the jury from another county; (2) the court erroneously admitted "other acts" evidence consisting of pornographic materials in Wayerski's possession; (3) he received ineffective assistance of counsel when his attorney failed to ask Wayerski during his testimony about statements he made to a State's witness and failed to seek a mistrial in response to admission of the pornographic materials; (4) the State committed a ***Brady***[2] violation by not disclosing a State witness's pending criminal charges; (5) the evidence was insufficient to convict him of eight counts of sexual assault by a person who works or volunteers with children, contrary to WIS. STAT. § 948.095(3) (2015-16),[3] because persons in his then-occupation (police officer) are not within the scope of the statute; and (6) he is entitled to a new trial in the interests of justice.

¶2 We conclude: the circuit court properly exercised its discretion in denying the change of venue and venire motion and in admitting the challenged pornographic evidence; Wayerski failed to demonstrate his trial attorney's assistance prejudiced his defense on the surrebuttal testimony or was deficient on

[1] Judge Stewart presided over the trial and entered the judgment of conviction. Judge Boyle presided over the postconviction hearings and entered the order denying the postconviction motion. For clarity, we refer to Judge Stewart as the "circuit court" and Judge Boyle as the "postconviction court."

[2] ***Brady v. Maryland***, 373 U.S. 83 (1963).

[3] Wayerski committed and was charged with the alleged offenses when the 2009-10 statutes were in effect. However, the portions of the statutes relevant to this appeal are materially unchanged from the current 2015-16 version. Thus, all subsequent references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

the motion for a mistrial; there was no ***Brady*** violation because it was not "an intolerable burden on the defense" to search CCAP[4] for the State witness's available pending criminal charges, *see* ***State v. Randall***, 197 Wis. 2d 29, 38, 539 N.W.2d 708 (Ct. App. 1995); the evidence at trial was sufficient for a jury to conclude that Wayerski—as a police officer or, in the alternative, as a volunteer who worked with the victims—satisfied all eight counts charged under WIS. STAT. § 948.095(3); and finally, Wayerski fails to show the interests of justice require a new trial. We therefore affirm the judgment and order.[5]

BACKGROUND

¶3 A criminal complaint alleged that from March to July of 2011 Wayerski engaged in repeated sexual contact with and exposed pornography to sixteen-year-old J.P. and seventeen-year-old J.H. At that time, Wayerski was the police chief for the Village of Wheeler and a police officer for the Village of Boyceville. A second amended Information later charged Wayerski with two counts of child enticement, contrary to WIS. STAT. § 948.07(3); two counts of causing a child to expose genitals or pubic area, contrary to WIS. STAT. § 948.10(1); two counts of exposing a child to harmful material, contrary to WIS.

[4] CCAP, which stands for Consolidated Court Automation Programs, is an internet-accessible case management system that "provides public access online to reports of activity in Wisconsin circuit courts." ***State v. Bonds***, 2006 WI 83, ¶6, 292 Wis. 2d 344, 717 N.W.2d 133.

[5] We remand to correct an error we discovered in the judgment of conviction. Wayerski initially entered pleas of not guilty and not guilty by reason of mental defect in this case, but he withdrew his pleas of not guilty by reason of mental defect prior to trial. Despite this withdrawal, the judgment of conviction reflects that Wayerski entered pleas of "Not Guilty-Mental Disease/Defect" for all sixteen charged violations. On remand, this apparent clerical error in the judgment of conviction should be corrected to reflect Wayerski entered pleas of "Not Guilty" to each offense. *See* ***State v. Prihoda***, 2000 WI 123, ¶27, 239 Wis. 2d 244, 618 N.W.2d 857 (circuit court may correct clerical error in written judgment or direct the clerk of courts to make the correction).

STAT. § 948.11(2)(a); two counts of causing a child over the age of thirteen to view or listen to sexual activity, contrary to WIS. STAT. § 948.055(2)(b); and eight counts of sexual assault by a person who works or volunteers with children, contrary to WIS. STAT. § 948.095(3).

¶4 Wayerski moved for a change of venue or a venire from outside of Dunn County, arguing that pretrial media coverage of the charges against him was prejudicial. He attached an affidavit to his motion containing several articles and internet searches regarding himself and his alleged crimes. At a pretrial hearing, the circuit court denied the motion, determining that "additional voir dire" would instead be conducted to ensure a fair jury was empaneled. Two weeks before trial, the court summarily denied Wayerski's letter requesting the court reconsider the motion.

¶5 Wayerski also brought a motion in limine seeking to exclude pornographic images discovered on Wayerski's electronic devices. The State proposed to admit at least thirty of those images at trial to provide context for the alleged crimes and to show Wayerski's intent and motive in committing the alleged offenses. The circuit court declined to determine the images' admissibility until trial.

¶6 A five-day trial produced the following evidence, primarily based upon the testimony of J.P. and J.H. As a police officer, Wayerski interviewed J.P. in mid-February of 2011 regarding a burglary of a church in Wheeler. After J.P. admitted his involvement, Wayerski offered to "mentor" and supervise him while he was on probation. Wayerski also approached J.P.'s mother about the arrangement, which she approved. Starting in March of 2011, J.P. went on several patrol "ride-alongs" with Wayerski in his squad car, during which Wayerski and

J.P. gradually began to discuss topics involving sex. Wayerski eventually invited J.P. to visit his apartment alone, which J.P.'s parents approved. During his first apartment visit, Wayerski offered to assist J.P. in improving his physical fitness, and he watched J.P. exercise. During a second visit, Wayerski had J.P. strip completely naked before slapping J.P.'s testicles, touching his penis, and masturbating him. J.P. testified he reluctantly trusted Wayerski's explanation that, as a former coach, this contact helped "g[et] your adrenaline going." J.P. continued to go on patrol ride-alongs with Wayerski and visit his apartment over a three-month period. J.P. testified that Wayerski and J.P. would often watch pornography on Wayerski's computer and, on more than twenty occasions, Wayerski masturbated him while doing so.

¶7 Wayerski issued J.H. a citation after he investigated a separate theft from the Wheeler church. J.H. and his father testified Wayerski arranged to "supervise" J.H.'s community service and to have J.H. go on patrol ride-alongs with him. Eventually, Wayerski invited J.H. to his apartment. J.H. testified that during his second visit, J.H. followed Wayerski's suggestion that J.H. engage in fitness activities. The workout eventually culminated in Wayerski stripping J.H. naked, massaging his upper and lower body, and masturbating him, which Wayerski said would aid in "building up endorphins." J.H. made seven to ten other visits to Wayerski's apartment during which, as J.H. explained, he and Wayerski would watch internet and on-demand cable pornography while Wayerski would, on occasion, take off J.H.'s clothes, rub his body, and masturbate him.

¶8 J.P. and J.H. testified about several other specific sexual acts Wayerski had them perform while they were alone with Wayerski at his apartment. Eventually, Wayerski invited both J.P. and J.H. to his apartment at the

same time for overnight stays, during which he would give them alcohol and watch pornography with them. Both J.P. and J.H. testified that during one night of drinking, Wayerski undressed and simultaneously "masturbated" both of them while they sat on a futon and watched on-demand pornography. J.P. and J.H. testified they told no one about these incidents of sexual contact or pornographic viewings because Wayerski threatened to send them to "juvie" or jail as a result of the past investigations if they told anyone.

¶9 During the last visit to Wayerski's apartment, J.P. and J.H. got into an argument with Wayerski about the amount of money they spent watching on-demand pornography. J.P. and J.H. then left the apartment on foot and walked several miles to a friend's house. After J.H.'s father picked them up, they told him that, over the past three months, they had been drinking and watching pornography at Wayerski's apartment and that Wayerski had been "molesting them."

¶10 After interviewing J.P. and J.H. regarding the incidents, sheriff's detective Scott Kuehn executed a search warrant for Wayerski's apartment. Kuehn discovered an oval turquoise plate with an odd substance on it and a cable bill containing charges for on-demand pornography from May to June. J.P. testified that Wayerski masturbated him and had him ejaculate onto an oval turquoise plate about two weeks before he reported the incidents. The substance on the plate was eventually determined to be semen and lubricant, and a crime laboratory technician testified the results of a DNA test of the semen matched J.P.'s DNA.

¶11 Law enforcement also seized Wayerski's computer. Deputy Jeff Nocchi testified about a large number of pornographic images recovered from the computer. Over Wayerski's objection, the court allowed nine of those images into

evidence, which consisted of teenage-appearing nude males. Nocchi also read to the jury some sexually-explicit chat logs on Wayerski's computer from an email address with the handle "dairymilkfarmer123." Photographs from Wayerski's cellphone were also admitted into evidence, including one showing Wayerski's head and bare chest, another of his exposed penis, and one of J.P. holding a plastic cup with his shirt unbuttoned and bare chest exposed.

¶12 Wayerski testified in his defense, denying all of J.P.'s and J.H.'s testimony regarding his sexual contact and viewing pornography with them. Wayerski further disputed the number of ride-alongs he had with J.P. and J.H., their parents' claims that he initially approached them about mentoring the boys, and the number of times the boys visited his apartment. Wayerski also presented four witnesses who generally testified that after Wayerski was arrested, J.P. told them that the allegations were untrue.

¶13 John Clark testified on rebuttal that he occupied a jail cell near Wayerski for a total of six to eight weeks. Clark related a conversation in which Wayerski asked Clark for advice on defending the charges and how he could "make the two individuals out to be liars." During another conversation, Clark testified that Wayerski admitted the boys watched pornography on his computer with him, he gave them alcohol, and "all I [Wayerski] did was jack them off." Clark testified he neither received nor asked the State for anything in return for his testimony. His reason for coming forward was because "[t]hey're kids. I think that says it all." Clark admitted he had been convicted of twenty crimes.

¶14 After Clark had testified, Wayerski's attorney recalled Wayerski to testify on surrebuttal. Wayerski was not questioned concerning Clark's testimony.

¶15 The jury found Wayerski guilty of all sixteen counts. He was sentenced to a total of fourteen years of initial confinement and sixteen years of extended supervision.

¶16 Wayerski brought a postconviction motion for a new trial on, among other grounds, ineffective assistance of counsel and the non-disclosure of criminal charges Clark had pending at the time of trial. Wayerski also reasserted his objections to the denial of the change of venue motion and admission of the pornographic images. Wayerski, his trial attorney, and detective Kuehn testified over the course of three hearings. The postconviction court rejected all of Wayerski's arguments and entered an order denying his motion. Wayerski now appeals. Further facts regarding the trial and postconviction hearings are provided in the discussion section.

DISCUSSION

I. Motion for Change of Venue

¶17 If an impartial trial cannot be held in a county, a defendant may move for a change of venue or, in the alternative, to have the jury drawn from another county. *See* WIS. STAT. §§ 971.22(1); 971.225(2). A circuit court's denial of a motion for a change of venue is reviewed for an erroneous exercise of discretion. ***State v. Albrecht***, 184 Wis. 2d 287, 306, 516 N.W.2d 776 (Ct. App. 1994). However, an appellate court must independently evaluate both the circumstances before and at the time of trial and "whether the procedures for drawing the jury evidenced any prejudice on the part of the prospective or empaneled jurors." ***Id.*** (quoted source omitted). In doing so, we may take the following factors into account:

> (1) the inflammatory nature of the publicity; (2) the timing and specificity of the publicity; (3) the degree of care exercised, and the amount of difficulty encountered, in selecting the jury; (4) the extent to which the jurors were familiar with the publicity; (5) the defendant's utilization of peremptory and for cause challenges of jurors; (6) the State's participation in the adverse publicity; (7) the severity of the offense charged; and (8) the nature of the verdict returned.

Id.

¶18 Wayerski does not structure an argument around these eight factors, but we understand him to generally assert he could not receive a fair trial in Dunn County due to prejudicial pretrial media.[6] He first contends the local media coverage of his case fell "on the high end of what might be viewed as objectionable." The record suggests otherwise. The media coverage evidenced in Wayerski's pretrial affidavit primarily consisted of newspaper articles regarding Wayerski's arrest, the pretrial proceedings, and his suspension as Wheeler police chief.[7] Pretrial publicity that is merely informative does not show inherent

[6] Wayerski appears to combine the "severity of the offense charged" with the "inflammatory nature of the publicity." In isolation, the severity of the charges may favor Wayerski, given his public office and the numerous alleged crimes against children, but "that individual fact is not conclusive" when weighed against the informational scope of pretrial publicity. *See* ***State ex rel. Hussong v. Froelich***, 62 Wis. 2d 577, 594-95, 215 N.W.2d 390 (1974) (allegations of "slaying and decapitation of a game warden" alone not enough to support change of venue in light of merely informative publicity), *overruled in part on other grounds by* ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990).

[7] Wayerski's argument appears to rest on two items in the affidavit, though he fails to elaborate on them in his briefing. First, the affidavit included an editorial from the Dunn County News written in response to a "recent arrest of a local law enforcement official"—without naming Wayerski or the victims—titled "True heroes: Victims who report sexual assault protect us all." Our review of the editorial indicates it is objective, only explaining the difficulties sexual assault victims face after coming forward instead of demonizing perpetrators. *Cf.* ***Briggs v. State***, 76 Wis. 2d 313, 327, 251 N.W.2d 12 (1977) ("Where reporting is objective, informational and non-editorial, it is not considered prejudicial."). Second, the affidavit included a printout of a social media post regarding Wayerski with a link from a group called "War Against Child Abuse" containing several, perhaps inflammatory, user comments. However, the post fails to show any connection to Dunn County and therefore does not evince any countywide prejudice.

community prejudice warranting a change of venue. *See* ***Briggs v. State***, 76 Wis. 2d 313, 327, 251 N.W.2d 12 (1977). The trial also began over fourteen months after Wayerski's initial arrest. *See* ***State v. Ritchie***, 2000 WI App 136, ¶26, 237 Wis. 2d 664, 614 N.W.2d 837 (the existence of a "cooling off" period between initial media coverage and date of trial favors no prejudice).

¶19 Wayerski does not dispute that the circuit court exercised considerable care in selecting the jury. The court questioned forty-seven potential jurors out of a possible sixty-five, which ultimately took nearly one full day. The court asked the venire if any of them had heard of this case in the local media and if they knew a friend or relative who had been a victim of sexual abuse. For those jurors who answered yes to either question, the rest of the venire was sent to the jury room while the court and the parties questioned the jurors one by one on the circumstances of their answers. This voir dire procedure closely mirrored that which we approved in ***Albrecht***, 184 Wis. 2d at 307, and we are satisfied that the court's procedural safeguards were proper here.

¶20 Wayerski insists the final selected jury was not impartial because twenty of the prospective jurors expressed familiarity with the press coverage. We are unpersuaded. The record reveals eleven of the potential jurors were struck for cause because of pretrial case knowledge concerns, while six were struck after admitting they could not be impartial in a sexual abuse trial, regardless of any media coverage. Wayerski also argues the jury could not remain impartial because three of the jurors indicated in voir dire that they heard of the case in pretrial media. Nevertheless, Wayerski fails to recognize a juror's awareness of pretrial publicity is not inherently prejudicial. *See* ***Briggs***, 76 Wis. 2d at 330. The three jurors stated during voir dire they had limited awareness of the case and they could serve fairly and impartially on the jury. Wayerski was provided six

preemptory strikes, rather than the standard four, *see* WIS. STAT. § 972.03, with which he could have removed those three jurors. He chose to use them on other prospective jurors. We therefore conclude the circuit court properly exercised its discretion in denying Wayerski's motion for a change of venue or an out-of-county jury selection.

II. Admissibility of "Other Acts" Evidence

¶21 Wayerski next argues the circuit court erred in admitting virtually all the evidence relating to his sexual interests on the grounds that it was impermissible "other acts" evidence. Specifically, Wayerski challenges admission of the following: (1) the nine pornographic images from Wayerski's computer; (2) the "dairymilkfarmer123" chat logs; (3) Nocchi's testimony describing the folders, search terms, and content of pornography found on Wayerski's computer; (4) the cable bill for on-demand pornography; and (5) the images of Wayerski's chest and penis.[8]

¶22 We review a circuit court's decision to admit or exclude other acts evidence for an erroneous exercise of discretion. ***State v. Marinez***, 2011 WI 12, ¶17, 331 Wis. 2d 568, 797 N.W.2d 399. A circuit court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law, uses a demonstrated rational process, and reaches a conclusion a reasonable judge

[8] Although Wayerski only objected at trial to admission of the nine images on "other acts" grounds, Wayerski argues his trial lawyer provided ineffective assistance by not raising "other acts" objections to the other pornography-related evidence. We address Wayerski's arguments regarding the admissibility of the remaining pornographic evidence in this section as well, insomuch as we disagree with Wayerski on the merits of this issue, and counsel does not perform deficiently by failing to raise a meritless argument. *See* ***State v. Swinson***, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12.

could reach. ***Id.*** If a circuit court fails to adequately set forth its reasoning, we may independently review the record to determine whether the facts within it support the court's ultimate decision. ***Id.***

¶23 Evidence of "other crimes, wrongs, or acts" is not admissible to prove a person's character in order to show the person acted in conformity therewith, but it may be offered for other purposes, such as proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." WIS. STAT. § 904.04(2)(a). A court must undertake a three-part analysis when considering whether to admit other acts evidence: (1) whether the evidence is offered for a permissible purpose under § 904.04(2)(a); (2) whether the evidence is relevant under WIS. STAT. § 904.01; and (3) whether the evidence's probative value is substantially outweighed by the danger of undue prejudice under WIS. STAT. § 904.03. ***State v. Sullivan***, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998). While the proponent of the evidence has the burden to establish that it is offered for a permissible purpose and is relevant, the burden falls on the opponent to show that undue prejudice outweighs any probative value. ***Marinez***, 331 Wis. 2d 568, ¶19.

¶24 J.P. testified Wayerski once performed oral sex on him while they watched pornography. J.P. further testified that, on one occasion, Wayerski lined him up against a wall while nude and spanked him, slapping his face, pounding his chest, and "ball tapping" him. During another occasion, Wayerski stripped J.P. naked and gave J.P. "birthday spankings" over Wayerski's lap before masturbating J.P. Similarly, J.H. testified that Wayerski once stripped him naked, bent him over, and "beat his ass with a spoon." J.H. also described an incident where Wayerski "milked him out," as Wayerski termed it, which J.H. explained involved

him kneeling on his hands and knees on Wayerski's coffee table while Wayerski masturbated J.H.

¶25 J.P. and J.H. never accessed any pornographic materials at Wayerski's apartment without his permission. They also testified Wayerski only showed them videos of heterosexual or female-only pornography. On one occasion, Wayerski attempted to show J.P. pornography involving "bondage" and "fetishes" but switched to other categories once J.P. indicated discomfort.

¶26 After Wayerski's computer was seized, Nocchi discovered about 100,000 pornographic images and several videos saved on it and organized under a folder titled "Gary." Nocchi testified that the majority of these images consisted of "male/male activities" with participants who appeared to be between sixteen- and twenty-years old. Nocchi further indicated that the images had been organized into user-generated subfolders with themes such as bondage, sadomasochism, "milking," "degrading," "punish," and "spanking" and that these folders were dated between May and July of 2011.

¶27 After Nocchi described the types of images on Wayerski's computer, the State moved outside the presence of the jury to admit thirty of those images. The circuit court observed that J.P.'s and J.H.'s testimony indicated those particular images of male/male activates "were not utilized with relation to the charges here," and it expressed concern with confusing the jury about the nature of the charges through presentation of all of the pornographic images. Nevertheless, the court determined that the images were relevant to show Wayerski "may have had this type of [pornographic] material" on his computer and certain images were relevant to the boys' testimony, in that they depicted "at least to some degree what they say occurred to them." The court further determined the images went to

"some of the elements that the State's required to prove, including things like motive, intent, plan, scheme, et cetera." The court declined to admit twenty-one of the images, but it selected nine for admission. Of the admitted images, two depicted naked males in a jail-type setting lined against a wall with men in police uniform present, while three depicted naked teenage males in various poses, and four depicted naked males being spanked.

¶28 Regarding the "dairymilkfarmer123" chat logs, Nocchi read selections from transcripts of the logs indicating the participants generally "talk[ed] about being punished" in explicit sexual terms. Nocchi also read the titles of saved pornographic web links on the computer, which he summarized as "relat[ing] to gay and/or S and M websites." Wayerski testified that J.P. and J.H. viewed pornography at his residence without his knowledge, and he denied downloading "kiddy porn" on his computer. He acknowledged that he may have viewed the nine images and that the "dairymilkfarmer123" email address belonged to him.

¶29 The first step of the ***Sullivan*** analysis "requires only that the other acts evidence be offered for a permissible purpose." ***State v. Normington***, 2008 WI App 8, ¶21, 306 Wis. 2d 727, 744 N.W.2d 867 (2007). In ***Normington***, pornographic images featuring anal insertions discovered on the defendant's computer were admitted at trial, where the defendant was alleged to have assaulted the victim by inserting an object into the victim's anus. ***Id.***, ¶¶7-8. We concluded the pornography properly showed the defendant's "motive" in committing the alleged offenses. ***Id.***, ¶¶2, 21. We further concluded the images of the "object insertion pornography" were relevant to the sexual assault charges, specifically to the probability that the defendant "found that practice sexually arousing," and were otherwise not outweighed by undue prejudice. ***Id.***, ¶¶24-25, 34-35.

¶30 Here, the circuit court explained the pornographic images were admissible for, among other reasons, showing both "motive" and "intent" on the elements of the charged crimes. The pornographic evidence as a whole revealed Wayerski was "motivated by his sexual interest" in older teenage males, as well as the specific types of conduct described by J.P. and J.H. *See* ***id.***, ¶21. Wayerski asserts that the entirety of the pornographic evidence was "unnecessary" to show purpose, but he fails to develop that argument on any particular item of evidence. We thus do not address the argument further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (appellate courts need not address undeveloped arguments).

¶31 The second step of the ***Sullivan*** analysis considers whether the evidence was relevant. To be relevant, "the evidence must relate to some fact that is of consequence to the determination of the action and it must have some tendency to make that fact more or less probable than it would be without the evidence." ***Normington***, 306 Wis. 2d 727, ¶22 (citing ***Sullivan***, 216 Wis. 2d at 772). On this standard, "there is no requirement that the purpose for which evidence of another act is proffered be an element of the crime." ***Id.***, ¶30.

¶32 We first address the relevance of the nine pornographic images. The circuit court determined the images were relevant because they involved: (1) Wayerski's alleged use of pornography; (2) the similarity between the victims' allegations and the pornographic depictions Wayerski possessed; and (3) corroborating Nocchi's testimony that the majority of the males on Wayerski's computer appeared to be aged sixteen to twenty years. Wayerski argues that relevancy determination was erroneous because the State failed to first establish a causal connection between the victims' allegations and the images introduced at trial. More precisely, he asserts that J.P. and J.H. never testified Wayerski showed

them male same-sex pornography or that Wayerski showed them the proffered images.

¶33 Wayerski overlooks that the State had to prove more than the fact that the victims viewed pornography. Rather, it also had to prove Wayerski had "sexual contact" with J.P. and J.H. with regard to the eight sexual assault counts charged under WIS. STAT. § 948.095(3), including that Wayerski had the intent to become sexually aroused or gratified. *See* WIS JI—CRIMINAL 2139A (2007); WIS JI—CRIMINAL 2101A (2007). Here, both teenage victims testified Wayerski frequently spanked them and used his position of power to spur this abusive conduct. As the court reasonably determined, the nine images portrayed similar themes. Evidence showing that a defendant possessed and viewed pornography similar to the alleged contact "make[s] it more probable" that a defendant made that contact with intent to become sexually aroused or gratified. ***Normington***, 306 Wis. 2d 727, ¶¶25-26.

¶34 In addition, on the child enticement charges under WIS. STAT. § 948.07(3), the State had to prove Wayerski possessed an intent to violate WIS. STAT. § 948.10, the child exposure charges, when he caused J.P. and J.H. to enter his apartment. Section 948.10 also required proof that Wayerski caused J.P. and J.H. to expose their genitals for the "purposes of [his] sexual arousal or sexual gratification." The images were of consequence to Wayerski's intent in inviting J.P. and J.H. to his apartment and his purpose for causing them to expose themselves. Specifically, the evidence of Wayerski's attraction to older teenage males made more probable that Wayerski's ultimate intent and purpose was not to assist the boys with exercise or to "mentor" them at his apartment, but rather to cause them to expose themselves for his own sexual motives. Accordingly, the

circuit court properly determined the images were relevant and probative to the charges.

¶35 Wayerski next argues the "dairymilkfarmer123" chat logs were irrelevant because there was no proof the victims were the recipient of the messages, nor did the victims testify Wayerski showed the explicit messages to them. However, the chat logs tended to prove Wayerski's intent, specifically his sexual interests in abusive conduct, such as spanking. *See* ***Normington***, 306 Wis. 2d 727, ¶25. Additionally, Wayerski's chat log moniker, as well as the user-created folder titled "milking," made more probable the truth of J.H.'s specific allegation that Wayerski "milked [him] out" as part of some sexual practice.

¶36 Nocchi's testimony about the pornographic websites and folders on Wayerski's computer was also relevant to the ultimate fact of Wayerski's control over and access to pornography, so as to prove the exposure to harmful material charges under WIS. STAT. § 948.11(2)(a) and the forced viewing of sexual activity charges under WIS. STAT. § 948.055(2). Wayerski argues that any evidence of his interest in and collection of pornography was irrelevant because neither victim testified they observed any male same-sex conduct similar to the images discovered on his computer. At trial, however, Wayerski himself denied that he had full control over pornography on his own computer, and he claimed it was viewed in his apartment without his knowledge. Nocchi's testimony on the types of pornography Wayerski possessed undermined Wayerski's testimony and made it more probable that Wayerski exposed J.P. and J.H. to harmful material and pornography. As the circuit court concluded regarding admission of the nine pornographic images, evidence that Wayerski used and maintained a large amount of pornography makes it more probable that he exposed J.P. and J.H. to some of his pornography.

¶37 Finally, Wayerski asserts the cable bill and the photograph of his penis were irrelevant other acts evidence. His arguments are unavailing. First, the cable bill containing charges for pornography between May and July 2011 was relevant and probative to J.P.'s and J.H.'s testimony that Wayerski exposed them to pornography ordered through his cable provider during that time period. Because the cable bill provided some direct evidence of exposing the boys to pornography, it is not "other acts" evidence at all. Second, the photograph of Wayerski's exposed penis was found alongside a photograph of J.P. with his shirt unbuttoned and abdomen and chest exposed. That photograph of J.P. is relevant to the child exposure charges. The image of Wayerski's penis and its location is relevant to bolster J.P.'s testimony that Wayerski caused J.P. to expose himself for Wayerski's sexual gratitude. Accordingly, we conclude the evidence was relevant and probative of the charged offenses here.

¶38 The third step of the ***Sullivan*** analysis is whether undue prejudice substantially outweighed the probative value of the challenged evidence. The burden is on Wayerski to show undue prejudice. *See* ***Marinez***, 331 Wis. 2d 568, ¶19. "Prejudice is not based on simple harm to the opposing party's case, but rather whether the evidence tends to influence the outcome of the case by improper means." ***Id.***, ¶41 (citation omitted). Wayerski contends the pornographic evidence was "irrelevant" and "so revolting and horrific and unnecessarily extensive" that it caused him to be portrayed as a "sexual deviant" and be convicted on that basis.

¶39 As we noted in ***Normington***, "it is unlikely that the jury would punish [the defendant] for the pornography rather than for the conduct he was charged with," given that "having a sexual interest in th[at] pornography is less, not more, disturbing" than the alleged misconduct at issue. ***Normington***, 306

Wis. 2d 727, ¶35. Similarly here, it is unlikely the jury found Wayerski guilty because of his possession of pornography rather than because of the more serious evidence of sexual misconduct against the boys. The pornographic images closely resembled the type of conduct that J.P. and J.H. testified Wayerski performed on them. The evidence as a whole was probative of his intent and motive in "grooming" J.P. and J.H. to eventually participate in sexual encounters in his apartment, despite his offers of mentorship, supervision, and physical fitness. Additionally, the circuit court properly exercised its discretion by taking measures to avoid confusing the jury on the nature of the charges and what it termed "overkill" on the use of pornography by allowing only nine—out of apparently 100,000—pornographic images to be shown to the jury. Despite his burden to do so, Wayerski fails to balance the probative value of any of the particular pornographic evidence against risk of undue prejudice.

¶40 In cases involving child sexual assaults, the "greater latitude rule" applies to admission of other acts evidence, allowing for a "more liberal evidentiary standard" on "each prong of the ***Sullivan*** analysis." ***Marinez***, 331 Wis. 2d 568, ¶20; *see also* ***Normington***, 306 Wis. 2d 727, ¶17. Although the circuit court did not invoke the greater latitude rule regarding the nine pornographic images, the rule serves as an additional basis in support of the court's exercise of discretion and the admissibility of the other evidence here.

¶41 Wayerski also contends there was prejudicial error because the circuit court failed to give a cautionary instruction on use of other acts evidence. However, Wayerski did not request that instruction at trial, so we decline to address his argument. *See* ***State v. Roth***, 115 Wis. 2d 163, 167-68, 339 N.W.2d 807 (Ct. App. 1983) (failure to request or object to jury instruction forfeits appellate review).

¶42 In all, we conclude the circuit court properly exercised its discretion in admitting the nine pornographic images and that the remaining evidence was also not erroneously admitted.

III. Ineffective Assistance of Counsel

¶43 Wayerski argues his trial attorney was ineffective in two respects: (1) he failed to question Wayerski about Clark's allegations; and (2) he did not move for a mistrial because of the admission of pornographic evidence. A defendant claiming ineffective assistance of counsel must prove both that counsel's performance was deficient and that this deficient performance prejudiced the defense. ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985) (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). To establish deficient performance, a defendant must show trial counsel's level of representation "fell below an objective standard of reasonableness." ***Id.*** at 636 (citing ***Strickland***, 466 U.S. at 688). To establish prejudice, a defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***State v. Jenkins***, 2014 WI 59, ¶37, 355 Wis. 2d 180, 848 N.W.2d 786 (citing ***Strickland***, 466 U.S. at 694). If a defendant fails to establish either deficient performance or prejudice, we need not address the other. *See* ***Strickland***, 466 U.S. at 697.

¶44 Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact. ***Jenkins***, 355 Wis. 2d 180, ¶38. We uphold the circuit court's findings of fact regarding the circumstances of the case and counsel's conduct and strategy unless they are clearly erroneous; while we review

independently the legal question of whether counsel provided ineffective assistance. ***Id.***

¶45 Wayerski first contends his trial attorney performed deficiently by failing to examine Wayerski during trial about whether he confessed his crimes to Clark. At the postconviction hearing, Wayerski testified that, had he been asked, he would have denied all of Clark's allegations. His attorney testified he could not recall any tactical reason for not asking Wayerski any questions about Clark's testimony. Wayerski contends this oversight was prejudicial because silence from a defendant who otherwise testifies is, in the face of the alleged jailhouse confession, "tantamount to an admission of guilt" on all of the charged offenses, which effectively deprived him of his right to present a defense.

¶46 Without addressing deficiency, we conclude Wayerski has failed to show prejudice. Clark's credibility was questioned regardless of whether Wayerski directly denied Clark's accusations. The jury was made aware that Clark was an inmate who had been in and out of jail and that he had been convicted of twenty crimes, some of which Clark volunteered were felonies. *See* ***Nicholas v. State***, 49 Wis. 2d 683, 688, 183 N.W.2d 11 (1971) (prior convictions relevant to credibility). In addition, there was never any doubt that Wayerski claimed innocence of all charges during the trial. The jury heard Wayerski assert the victim's allegations were false on direct and cross-examination. Four witnesses testified they heard J.P. recant the accusations. Moreover, even if Wayerski was questioned and denied the jailhouse confession, there still would have been competing evidence on the issue of what Wayerski said to Clark.

¶47 Most importantly, the evidence of Wayerski's guilt was overwhelming, regardless of whether he denied Clark's testimony regarding the

jailhouse confession. J.P. and J.H. gave detailed testimony, and substantial evidence recovered from Wayerski's apartment corroborated their accounts, particularly the on-demand pornography bill and the plate containing J.P.'s semen. The victims' parents corroborated the frequent ride-alongs and visits to Wayerski's apartment. Even if Wayerski convinced the jury that Clark was incredible regarding Wayerski's jailhouse confession, there was ample other evidence upon which the jury could have relied to find guilt. Accordingly, Wayerski has not met his burden of showing there is a reasonable probability the result of the proceeding would have been different if Wayerski had directly denied Clark's testimony on Wayerski's confession.

¶48 Wayerski next argues his attorney was ineffective for not moving for a mistrial after the circuit court admitted the pornography-related evidence. We have rejected his arguments that the evidence was inadmissible, *see supra* ¶¶29-42, leaving him with no basis for a mistrial. "Trial counsel's failure to bring a meritless motion does not constitute deficient performance." ***State v. Swinson***, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12.

IV. *Brady* Claim

¶49 Wayerski argues the State committed a ***Brady*** violation when it failed to inform him of Clark's pending criminal charges listed on CCAP. A defendant has a due process right to have disclosed to him or her any favorable evidence that is "material either to guilt or to punishment" in the State's possession, *see* ***Brady v. Maryland***, 373 U.S. 83, 87 (1963), including any evidence which may impeach one of the State's witnesses, ***Giglio v. United States***, 405 U.S. 150, 154 (1972). Evidence is not material under ***Brady*** "unless the nondisclosure was so serious that there is a reasonable probability that the

suppressed evidence would have produced a different verdict." ***Strickler v. Greene***, 527 U.S. 263, 281 (1999). A ***Brady*** violation thus has three components: (1) the evidence was favorable to the defendant; (2) the State suppressed the evidence either willfully or inadvertently; and (3) suppression of the evidence prejudiced the defendant. ***State v. Harris***, 2004 WI 64, ¶15, 272 Wis. 2d 80, 680 N.W.2d 737 (citing ***Strickler***, 527 U.S. at 281-82). When addressing an alleged ***Brady*** violation, we independently review whether a due process violation has occurred, but we accept the circuit court's factual findings unless they are clearly erroneous. ***State v. Lock***, 2012 WI App 99, ¶94, 344 Wis. 2d 166, 823 N.W.2d 378.

¶50 Detective Kuehn interviewed Clark at the Chippewa County Jail on September 16, 2011. At the postconviction hearings, Kuehn testified he was aware at that time that Clark was on a probation hold but was not charged with any criminal offenses. On September 7, 2012, about one month before trial, Clark was charged in Chippewa County with six criminal counts, including two counts of sexual intercourse with a child who had attained the age of sixteen years. At the time of Wayerski's trial, Clark had completed an initial appearance in his case, but his charges had not been resolved.

¶51 The prosecutor claimed to have discovered Clark's Chippewa County charges a few days before trial while searching CCAP, and he obtained a copy of the criminal complaint pursuant to that search. The prosecutor did not inform Wayerski's attorney of the charges. Wayerski's attorney testified at the postconviction hearing that he recalled performing some "CCAPing" of Clark "concentrating on his criminal convictions," but he could not recall with "one hundred percent specificity" if he did so with respect to both Clark's convictions and charges.

¶52 The postconviction court determined Clark's pending charges were available on CCAP, but the prosecutor did not inform Wayerski's attorney of this fact before or during trial. Citing ***Randall***, the court concluded the State had a duty to disclose the new charges against Clark shown on CCAP to Wayerski. However, again citing ***Randall***, the court concluded the failure to inform Wayerski of Clark's pending criminal charges was harmless error and rejected Wayerski's argument on that basis.

¶53 Wayerski argues disclosure of the charges before trial would have allowed him to "devastate" Clark's credibility on cross-examination, particularly regarding Clark's own charged child sex crimes, thus calling the trial's outcome into question. The State concedes that Clark's pending charges were favorable to Wayerski because they tended to impeach Clark's ostensible concern for child sex abuse as his reason for testifying at trial. *See* ***State v. Barreau***, 2002 WI App 198, ¶55, 257 Wis. 2d 203, 651 N.W.2d 12 (right to confrontation "includes the right to reveal potential bias" stemming from pending criminal charges). Instead, the State disputes whether a ***Brady*** violation even occurred here, citing ***Randall***, because of the public availability of Clark's CCAP record.

¶54 In ***Randall***, the State failed to inform the defendant that a witness in his homicide trial had been arrested and criminally charged two months prior to the trial. ***Randall***, 197 Wis. 2d at 35. The circuit court concluded there was no violation of the prosecutor's duty to disclose because the witness's pending charges were "a matter of public record" and not in the "exclusive control" of the State. ***Id.*** at 37-38. We disagreed, explaining the circuit court's conclusion

> place[d] an *intolerable burden on the defense*; namely, to continually comb the public records to see if any of the State's witnesses are facing pending criminal charges. The burden should rightly rest with the State to provide such

> updated information, particularly in light of a specific discovery request for the criminal records of the State's witnesses, as was present in this case.[9]

Id. at 38 (emphasis added). We ultimately concluded the failure to disclose the witness's pending prosecution was harmless error because the evidence of the defendant's guilt was "very compelling," the witness was arrested and charged after he offered to testify, and the witness was impeached at trial when he admitted he had been convicted of a crime. ***Id.*** at 38-39.

¶55 The basis for the ***Randall*** decision was to avoid placing an "intolerable burden on the defense" to extensively search for hard-to-secure evidence. ***Id.*** at 38; *see also* ***Carvajal v. Dominguez***, 542 F.3d 561, 567 (7th Cir. 2008) (evidence is suppressed when it is "not otherwise available to the defendant through the exercise of reasonable diligence"). At the time ***Randall*** was decided, "comb[ing] the public records" for the criminal record of every witness disclosed before trial entailed a trip to a physical site, usually the courthouse (or courthouses), to sift through potentially vast paper records. ***Randall***, 197 Wis. 2d at 38. Conversely, in this case, only access to CCAP is at issue, not public records at large. Due to widespread technological advances since ***Randall*** was decided, CCAP has "facilitated efficient use of court resources and greater access to court information by the public," allowing wide access to those records via the internet. ***State v. Bonds***, 2006 WI 83, ¶47, 292 Wis. 2d 344, 717 N.W.2d 133. At the postconviction hearing, Wayerski's attorney testified he "could have found out

[9] Wayerski made a request for discovery and inspection over a year before trial. Although Wayerski cites the criminal discovery statute, WIS. STAT. § 971.23(1)(h), which requires that a prosecutor disclose "[a]ny exculpatory evidence" before trial, he fails to develop any argument that the State otherwise failed to meet its statutory discovery obligations in this case. We shall not abandon our neutrality to develop arguments on a party's behalf. *See* ***Munger v. Seehafer***, 2016 WI App 89, ¶42, 372 Wis. 2d 749, 890 N.W.2d 22.

about" Clark's pending charges—but did not—on CCAP, just as the prosecutor did.

¶56 When narrowed to use of CCAP alone, there is little doubt that it is not "an intolerable burden" for the defense to obtain information on a witness's pending criminal charges. ***Randall***, 197 Wis. 2d at 38. Clark's identity as a State witness and the fact that he was in jail at the time were both known to Wayerski, and any pending charges could have been readily determined through CCAP. We conclude, consistent with ***Randall***, it was not an "intolerable burden on the defense" to search CCAP for pending criminal charges of a witness prior to trial. ***Id.*** at 38. Therefore, we also conclude the CCAP record of Clark's pending charge was not "suppressed" under ***Brady***. *See* ***Strickler***, 527 U.S. at 281-82.

¶57 Even if we assume suppression occurred here, Wayerski has failed to show a reasonable probability of a different result had the CCAP record been disclosed. *See* ***Harris***, 272 Wis. 2d 80, ¶15. Prejudice under ***Brady*** only results when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." ***Strickler***, 527 U.S. at 290 (quoted source omitted). Non-disclosure of the CCAP record was not prejudicial when viewing this case in its entirety. Clark was already impeached when the jury was informed of his twenty prior convictions. *See* ***Randall***, 197 Wis. 2d at 39; *see also* ***State v. Rockette***, 2006 WI App 103, ¶41, 294 Wis. 2d 611, 718 N.W.2d 269 (Evidence is not material when it "merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable."). Moreover, the State's case-in-chief provided "very compelling" evidence of guilt on the multitude of offenses apart from Clark's testimony on the jailhouse confession. *See* ***Randall***, 197 Wis. 2d at 38. Because

the CCAP record showing Clark's pending criminal charges was not "material" evidence, a ***Brady*** violation did not occur. ***Harris***, 272 Wis. 2d 80, ¶14.

V. Sufficiency of the Evidence on the Eight Counts of Violating WIS. STAT. § 948.095(3)

¶58 Wayerski challenges the sufficiency of the evidence supporting his conviction on eight counts of sexual assault of a child by a person who works or volunteers with children, contrary to WIS. STAT. § 948.095(3)(a). Although Wayerski frames this issue as involving sufficiency of the evidence, he first argues § 948.095(3)(a) did not apply to him because he was a police officer. Thus, as a threshold matter, Wayerski raises an issue of statutory interpretation, which is a question of law that we review independently. *See* ***State v. Wilson***, 2017 WI 63, ¶20, 376 Wis. 2d 92, 896 N.W.2d 682. Statutory interpretation begins with the language of the statute. ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. If the statute's text is plain or unambiguous, the inquiry ends, and we need not consult extrinsic sources. ***Id.***

¶59 WISCONSIN STAT. § 948.095(3)(a) provides that:

> A person who has attained the age of 21 years and who engages in an occupation or participates in a volunteer position that requires him or her to work or interact directly with children may not have sexual contact or sexual intercourse with a child who has attained the age of 16 years, who is not the person's spouse, and with whom the person works or interacts through that occupation or volunteer position.

Here, the jury was instructed that to find guilt on each count of § 948.095(3), the State needed to prove, among other elements, the victim was a person with whom the defendant worked or interacted through his or her occupation or volunteer position. *See* WIS JI—CRIMINAL 2139A (2007).

¶60 Wayerski interprets WIS. STAT. § 948.095(3)(a) as "inapplicable to child sexual assaults by police officers." Wayerski cites § 948.095(3)(d), which states:

> Evidence that a person engages in an occupation or participates in a volunteer position relating to any of the following *is prima facie evidence* that the occupation or position requires him or her to work or interact directly with children:
>
> 1. Teaching children.
> 2. Child care.
> 3. Youth counseling.
> 4. Youth organization.
> 5. Coaching children.
> 6. Parks or playground recreation.
> 7. School bus driving.

(Emphasis added.)

¶61 Wayerski asserts that his former occupation, police officer, is not one of the occupations or activities specifically listed in WIS. STAT. § 948.095(3)(d), and therefore he could not be convicted under that statute. However, § 948.095(3)(d) does not contain an exclusive list of persons who, under para. (3)(a), engage in occupations or participate in volunteer positions that require them to work or interact directly with children. Rather, para. (3)(d) merely allows the State to establish as prima facie evidence that defendants engaged in the listed occupations do work or interact directly with children. Here, the jury was not instructed that the State established such prima facie evidence. Nothing in para. (3)(d) restricted the State from establishing that Wayerski engaged in an occupation or participated in a volunteer position that required him to work or interact directly with children, even though a prima facie case was not established.

¶62 We agree with the State that a police officer may be shown to be "require[d]" to work with children as contemplated under WIS. STAT. § 948.095(3)(a). As the State observes, WIS. STAT. ch. 938, the juvenile justice code, imposes duties on "law enforcement officers" expressly involving direct interaction with children.[10] ***Kalal***, 271 Wis. 2d 633, ¶46 (statutes interpreted "in relation to the language of surrounding or closely-related statutes"). Law enforcement officers are also permitted to take a child into custody if there are reasonable grounds to believe the child is injured, ill, or in immediate danger, WIS. STAT. § 48.19(1)(d)5., and law enforcement agencies must investigate reports of child abuse, WIS. STAT. § 48.981(3)(b).

¶63 Having rejected Wayerski's statutory interpretation, we next turn to whether the evidence was sufficient to convict him of sexual assault by a person who works or volunteers to work with children under WIS. STAT. § 948.095(3).[11] When a defendant challenges the sufficiency of the evidence to support his or her conviction, we may not reverse the 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." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

[10] *See, e.g.*, WIS. STAT. § 938.19(1)(d) (setting forth reasonable grounds in which "a law enforcement officer" may take a juvenile into custody); WIS. STAT. § 938.195(3) ("law enforcement officer" conducting custodial interrogation of juvenile need not inform juvenile of electronic recording); and WIS. STAT. § 938.24(5) ("law enforcement officer" may make recommendation concerning the juvenile's disposition).

[11] Wayerski argues for the first time in his reply brief that WIS. STAT. § 948.095(3) is unconstitutionally vague or violates the "fair warning doctrine." We do not address this issue. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998) (appellate courts do not address issues raised for the first time in an appellant's reply brief).

¶64 Despite being a police officer, Wayerski contends the evidence was insufficient to prove he worked in an occupation in which he interacted with children in general or with J.P. and J.H. in particular. He cites the testimony of a Dunn County deputy that it was not "standard practice" for a law enforcement officer to supervise community service or probation, as Wayerski did for both victims here. However, that same deputy testified that law enforcement officers must interact with individuals "whether they're adults or juveniles in regard to investigations and ultimately writing citations or arresting" those persons.

¶65 We conclude there was sufficient evidence upon which the jury could reasonably find Wayerski's position required him to work with children, specifically J.P. and J.H. Indeed, it is undisputed that Wayerski had substantial interactions, both formally and informally, with J.P. and J.H. in his capacity as a law enforcement officer. Wayerski interacted with the juveniles when investigating theft incidents involving them and engaged in discussions with their parents on how to resolve the charges. Wayerski thereafter took J.P. and J.H. on patrol "ride-alongs," which he testified was done as part of a village program.

¶66 In addition, the evidence allowed the jury to infer that Wayerski "participated in a volunteer position" under WIS. STAT. § 948.095(3) involving both J.H. and J.P. Both J.P. and his mother testified Wayerski engaged in a "mentorship" arrangement, in which Wayerski was akin to an informal supervisor, as part of J.P.'s probation for the theft incident. J.H.'s father testified that Wayerski, at the direction of the village president, organized a community service project in which J.H. participated. Those informal volunteer positions took a dark turn when, according to both J.P. and J.H., Wayerski invited them to his apartment and used his position in law enforcement to commit crimes against them and coerce them into not reporting his misconduct. We conclude the evidence

sufficiently proved Wayerski worked in an occupation in which he directly worked or volunteered to work with J.H. and J.P., satisfying a verdict of guilt on all eight counts under WIS. STAT. § 948.095(3).

VI. New Trial in the Interests of Justice

¶67 Finally, Wayerski argues we should grant him a new trial in the interests of justice under WIS. STAT. § 752.35 because the real controversy was not fully tried. *See* ***State v. Williams***, 2006 WI App 212, ¶12, 296 Wis. 2d 834, 723 N.W.2d 719. "Our discretionary reversal power is formidable, and should be exercised sparingly and with great caution." ***Id.***, ¶36. Wayerski redirects us to his arguments on Clark's testimony and the admission of the pornographic evidence, and he insists this is an exceptional case because of those cumulative errors. We have rejected all those arguments, and adding them together "adds nothing. Zero plus zero equals zero." ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976). For the reasons we have already stated, Wayerski is not entitled to a new trial.

By the Court.—Judgment and order affirmed and cause remanded with directions.

Not recommended for publication in the official reports.