STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs. Appeal No. 2014AP000827-CR

RORY A. McKELLIPS,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT RORY A. McKELLIPS

APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE ENTERED ON DECEMBER 6, 2013, IN THE CIRCUIT COURT FOR MARATHON COUNTY, THE HONORABLE MICHAEL K. MORAN, PRESIDING

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INTRODUCTION

Defendant-appellant Rory A. McKellips, who coached girls' basketball for twenty years, was convicted of one count of using a "computerized communication system" to facilitate a child sex crime, contrary to section 948.075(1r), *Stats.* McKellips asserts that his older-model "flip" mobile phone, having no independent internet capability or other features now commonly found on iPhones and Android-based Smartphones, was not a "computerized communication system" under section 948.075(1r). Alternatively, he asserts that section 948.075(1r) was unconstitutional as applied to him because people of common, ordinary intelligence would not know that an older model flip mobile phone without internet capability was a computerized communication system. McKellips further seeks reversal on grounds that the circuit court's admission of testimony that he made a former basketball player whom he coached "uncomfortable" and bought her and his daughter gifts over twenty

years earlier. This testimony, admitted despite glaring dissimilarities between this "other acts" evidence and the acts charged in this case, was improperly admitted under the standard established in *Sullivan*. Moreover, given the jury's acquittal on two charges involving child sex crimes, the admission of that evidence prejudiced and tainted the jury's consideration of the computer count.

STATEMENT OF THE ISSUES

1. Is an older model mobile phone with no independent internet capabilities a "computerized communication system" as that term is used in section 948.075(1r) *Stats*.?

Answered "yes" by circuit court.

2. Is section 948.075(1r) unconstitutionally vague as applied and interpreted by the circuit court because persons of ordinary intelligence would not understand that use of a mobile phone that has no independent internet capabilities would constitute use

of a "computerized communication system" in violation of law?

Answered "no" by circuit court.

3. Did the circuit court improperly allow the state to introduce twenty-year old "other acts" evidence?

Answered "no" by circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case presents an issue of first impression in Wisconsin, warranting both oral argument and publication. Oral argument would give the Court an opportunity to question counsel regarding construction of the phrase "computerized communication system" in section 948.075(1r), *Stats.*, including the Legislature's intent in enacting the statute in 2003 and in applying it in light of technological advances since its enactment. After the Court interprets this language, publication is necessary to provide guidance for citizens, attorneys and courts in applying the statute.

STATEMENT OF THE CASE

A. Nature of the Case.

The primary issue in this appeal is whether McKellips' mobile phone constituted a "computerized communication system" within the meaning of section 948.075(1r). The circuit court found that the phone met the statutory definition. After McKellips' petition for interlocutory review was denied, he went to trial, during which the court admitted "other acts" evidence proffered by the state. Ultimately, a jury convicted McKellips of one count of using a computer, *i.e.*, his mobile phone, to facilitate a child sex crime and one count of resisting/obstructing an officer, but found him not guilty of engaging in repeated sexual assault of a child and of exposing his pubic area/genitals to a child. McKellips appeals only his conviction of violating section 948.075(1r).

B. Course of Proceedings.

This action commenced with the filing of a criminal complaint on September 12, 2011. (R.1).

McKellips waived his preliminary hearing, was arraigned and received the state's information on November 21, 2011. (R.22;R.23).

On July 23, 2012, McKellips filed a motion to dismiss Count 3 of the Information, which alleged use of a computerized communication system to facilitate a child sex crime, on grounds that no reasonable jury would find that he committed that charged offense because a mobile phone without independent internet capabilities is not a "computerized communications system" as required by section 948.075(1r). (R.29;R30). Alternatively, McKellips sought an order determining that section 948.075(1r) is unconstitutionally vague as applied to him because persons of ordinary intelligence would not understand that use of a mobile phone without independent internet capabilities would constitute use of a "computerized communication system." (Id.). The state opposed the motion. (R.32).

The court considered and denied McKellips' motion at a final pretrial conference on December 21,

2012. (R.49:9-16;App.151-58). The court found that a reasonable jury would find that McKellips' phone was a "computerized communication device" within the meaning of the statute, and that the statute was not vague as applied. (Id.).

Regarding the vagueness issue, the court stated:

> …given what I have decided is that this is a type of a computer as an electronic device that does perform logical arithmetic and logical functions. I don't believe that it satisfies or is unconstitutionally vague. Again, I believe that a person of ordinary intelligence would understand that using this type of technology to send messages over a computerized network would constitute the use of a communication system.

(R.49:16;App.158).

At the same hearing, the court addressed the state's request for additional testing of McKellips' telephone and a potential expert. (R.49:17-18;App.159-60). Six days later, the state filed an amended Information adding a charge of resisting/obstructing an officer related to the phone. (R.36).

Just over a week later, the state moved to admit other acts evidence (R.37), which McKellips opposed. (*See* R.43:2). Subsequently, after receiving additional discovery, McKellips filed a supplemental brief opposing the state's motion to admit other acts evidence. (R.45). Although stating it was a "very tough decision," the court found that the evidence had more probative value than prejudicial effect and granted the state's motion. (R.43:31;App.136). The court entered an order on March 5, 2013. (R.42;App.104).

A written order regarding the court's interpretation of section 948.075(1r) was signed and entered on March 12, 2013, which was corrected, signed and entered the next day. (R.47;R.48;App.105). McKellips filed a timely petition for interlocutory appeal of that order and the order regarding the admission of other acts evidence, but this Court denied interlocutory review.

The case was tried to a jury from June 24 to June 28, 2013. (R.66-69;R.71). The jury found McKellips

guilty of the computer and resisting/obstructing counts described above but not guilty of repeated sexual assault of a child and of exposing pubic area/genitals to a child. (R.69:257-58). The court revoked bond and McKellips was remanded to state custody. (R.69:262).

McKellips filed post-verdict motions to dismiss for insufficient evidence and to reinstate bail on August 13, 2013. (R.62-R.64). He also moved to adjourn sentencing in light of the new criminal complaint the state filed (Marathon County Case Nos. 13-CF-603 and 13-CF-604) on July 19, 2013, charging McKellips and his wife Connie with perjury less than one month after the trial was concluded. (R.65). Ultimately, following motions to dismiss and *in limine*, the perjury charge against Connie was dismissed and the charge against McKellips was dismissed but read into the record for purposes of sentencing in the 2011 case. (*See* R.80:83)[1]. McKellips opposed the court considering the perjury

[1] The transcript of the November 14, 2013 hearing was not ordered as it was not necessary for this Court to address the issues in this appeal.

charge at sentencing (R.80:52-59), but the court did so over objection. (R.80:83-84).

On December 6, 2013, the court sentenced McKellips to ten years in prison plus five years extended supervision on the computer count and nine months in the local jail on the resisting charge. (R.80:92-93). The judgments of conviction and sentence as to the mobile phone and resisting/obstructing charges were entered on December 10, 2013, (R.75;R.76;App.101-03). McKellips filed a timely notice of intent to seek postconviction relief on December 19, 2013. (R.77). After receiving all transcripts, McKellips filed a timely notice of appeal on April 9, 2014. (R.81).

C. Disposition Below.

McKellips was convicted of one count of using a "computerized communication system" to facilitate a child sex crime and one count of resisting or obstructing an officer. The circuit court sentenced McKellips to ten years in prison, plus five years extended supervision, on

the computer count and nine months in the local jail on the resisting charge.

STATEMENT OF FACTS

McKellips was a successful basketball coach in the central Wisconsin area for twenty-seven years at the time he was charged with the present offense. (R.69:66). He coached for over twenty years in Mosinee, followed by one year at Wisconsin Valley Lutheran, and finally he began coaching at Athens High School in 2010. (R.69:69). Athens is forty miles away from Mosinee, where McKellips continued to work and reside, and McKellips had a difficult time maintaining communication and respect during the off-season. (R.69:70-73). During the summer of 2011, one of McKellips' captains for the 2011 season was C.J.H. (R.69:72). C.J.H.'s mother was also organizing events for McKellips in Athens. (*Id.*) McKellips maintained contact with C.J.H. throughout the off-season in the summer of 2011. (*Id.*)

During these phone contacts with C.J.H., C.J.H. began confiding in McKellips about more personal matters, such as her friendships with other students and her relationships with her parents and step-parents. (R.69:73-74). At some point, McKellips purchased a phone for C.J.H. (R.69:83-84).

During mid-June of 2011, C.J.H. tore the ACL in her knee playing in a basketball tournament. (R.67:43). C.J.H. testified at trial that she understood that to be a serious injury, with a six-to-nine month recovery. (R.67:44). C.J.H. was upset about the injury and the impact it would have on her basketball career. (R.67:47-48;R.69:88).

C.J.H. testified at trial that from approximately mid-June to Labor Day of 2011, there were approximately three to four occasions during which she and McKellips engaged in sexual contact. (R.67:54-76). McKellips presented evidence throughout the trial in opposition to these allegations, including evidence from other individuals who were present during the times

that C.J.H. claimed to have been alone with McKellips, to pictures of the unlikely location where these incidents were alleged to have occurred, to pointing out inconsistencies in C.J.H.'s testimony. (R.66-69;71). Ultimately, the details regarding these allegations have little import on this appeal as McKellips was acquitted of charges that he had sexual contact with C.J.H. and exposed himself to her, and was convicted of a charge that did not require any sexual contact between him and C.J.H. (R.69:213; 257-60).

During this same period that C.J.H. alleged that she and McKellips were having sexual contact, the two did remain in contact by phone. (R.69:86-87). The phone McKellips was using to communicate with C.J.H. was a Motorola Moto 408-G. (R.68:10). It was undisputed that the phones with which McKellips and C.J.H. were communicating were not smart phones and did not have a data plan with which to access the internet. (R.49:7-8). Although the state alleged that C.J.H. sent McKellips picture messages through the

phone, McKellips' ability to open those messages remained in dispute, and the state presented no evidence proving that he opened the photos. (R.68:76-85;102-15). Notably, the state did not allege that McKellips utilized any picture messages in order to contact C.J.H.—only that C.J.H. sent messages to McKellips. (R.66-69;71).

At no point during the trial or at any point during the pendency of the case did anyone indicate that McKellips used Facebook, Twitter, Instagram, chat rooms, instant messaging, e-mail, or any other form of social media or computer program to contact C.J.H. (*See* R.66-69,71). The only device that was ever argued to constitute a "computerized communication system" was McKellips' cell phone, with which no one ever alleged he accessed the internet. (*Id.*)

As for the other acts evidence, T.S.'s testimony was that twenty years prior to the charged offenses, McKellips made her feel "uncomfortable" when she competed on his basketball team and she received gifts

from McKellips. (R.71:174-75). T.S. further indicated that she received notes from McKellips that "made her feel uncomfortable," and that they were "very inappropriate," although she could not recall the specific content of the notes. (*Id.*) T.S. indicated that she believed the letters were "the type of letters that a girlfriend would receive from a boyfriend." (R.71:181).

T.S. also testified about instances of physical contact; specifically, she alleged that McKellips held her hand, rubbed her thigh, and massaged her upper shoulders and back. (R.71:182-83). When asked how the "uncomfortableness" stopped, she indicated that it stopped in high school because she "avoided him" as much as she could. (R.71:183).

T.S. acknowledged on cross-examination that, despite her claims of avoiding McKellips, she actually went on a week-long vacation with the McKellips family during high school. (*Id.*) Brooke Bargender, McKellips' daughter and T.S.'s best friend during middle-school and high-school, testified that T.S. never

would have had occasion to be alone with her father, as Brooke would have always been around. (R.68:124-30). Brooke testified further that one of the gifts T.S. received actually occurred when McKellips provided Brooke with money to go shopping, and Brooke and T.S. spent that money together. (*Id.*) Finally, Brooke pointed out that while T.S. claimed to feel "uncomfortable" with McKellips and "avoided him" as much as she could, T.S. actually volunteered to spend a week with McKellips helping with basketball camps for several years after high school. (*Id.*)

At no point did T.S. indicate, either prior to trial or during trial, that McKellips engaged in -- or even attempted to engage in -- any sexual contact with her whatsoever, let alone contact that would be similar to the allegations C.J.H. made at trial. (R.71:171-87).

STANDARD OF REVIEW

"[T]he interpretation of a statute and its application to a particular set of facts present questions of law." *State v. Soto*, 2012 WI 93, ¶14, 343 Wis. 2d 43,

53, 817 N.W.2d 848. If the meaning of the statute is clear from the plain language, the Court must give effect to that language. *Id.* at ¶19, 343 Wis. 2d at 55. Statutory terms are given their "common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* (quoting *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 663, 681 N.W.2d 110).

Courts determining the plain meaning of a statute may look to statutory context and structure, as context may be "highly instructive in determining a term's meaning." *Soto*, at ¶20, 343 Wis. 2d at 55-56 (citing *State v. Jensen*, 2010 WI 38, ¶15, 324 Wis. 2d 586, 595, 782 N.W.2d 415). In addition, courts may consider the purposes underlying a statute in determining its meaning. *Id.* (citing *Sheboygan Cnty. Dep't of Health & Human Servs. v. Tanya M.B.*, 2010 WI 55, ¶28, 325 Wis. 2d 524, 785 N.W.2d 369). Rules of statutory construction also require that a statute not be

interpreted to reach an absurd result. *Green Bay Redev. Auth. v. Bee Frank, Inc.*, 120 Wis. 2d 402, 409, 355 N.W.2d 240 (1984); *WHEDA v. Bay Shore Apartments,* 200 Wis. 2d 129, 142 (Ct. App. 1996).

This Court reviews a circuit court's admission of other acts evidence under the erroneous exercise of discretion standard. *State v. Sullivan,* 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). Such rulings are sustained only if the circuit court examined the relevant facts, applied a proper standard of law and, using a demonstrable rational process, reached a conclusion a reasonable judge could reach. *Id.* at 780-81 (citing *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982) (citing *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d (1971))). "A circuit court's failure to delineate the factors that influenced its decision constitutes an erroneous exercise of discretion." *Id*.

ARGUMENT

I. McKellips' Conviction Should Be Reversed Because He Did Not Violate Section 948.075(1r).

This appeal presents two issues of first impression. No Wisconsin appellate decision has held, or even considered, whether using a mobile phone lacking independent internet capabilities meets the statutory definition of using a "computerized communication system." Similarly, no Wisconsin court has determined whether section 948.075(1r) is unconstitutional as applied where the mobile phone at issue had no independent internet capabilities.

In pertinent part, section 948.075 provides:

> (1r) Whoever uses a computerized communication system to communicate with an individual who the actor believes or has reason to believe has not attained the age of 16 years with intent to have sexual contact or sexual intercourse with the individual in violation of s. 948.02 (1) or (2) is guilty of a Class C felony.
>
> * * *
>
> (3) Proof that the actor did an act, other than use a computerized communication system to communicate

> with the individual, to effect the actor's intent under sub. (1r) ***shall be necessary to prove that intent.***

(Emphasis added). Thus, to convict McKellips of violating section 948.075(1r), the state must prove beyond a reasonable doubt that McKellips used a "computerized communication system" with intent to have sexual contact or intercourse with a child.[2]

A. Use Of A Mobile Phone Without Independent Internet Capabilities Is Not Use Of A "Computerized Communication System."

The only evidence the state proffered to establish the offense of using a "computerized communication system" was McKellips' use of his mobile phone. (*See* R.66-69,71). The state proffered no evidence that McKellips used a desktop computer, a laptop computer, an iPad, a tablet or any similar device. Nor did the state present any evidence that McKellips logged in to computer chat rooms to seek out children for sexual purposes, or that he engaged in sending emails, talking

[2] The criminal complaint, information and amended information refer to the offense as being with "intent to facilitate a child sex crime." McKellips has elected to use the statutory language in this brief.

via Skype or Facebook, or using any other technologies commonly associated with computers to communicate with C.J.H., the alleged victim in this case. Thus, the question is whether the use of a mobile phone lacking independent internet capabilities fulfills the statutory element of using a "computerized communication system."

Wisconsin's statutes are replete with provisions created to protect children from sexual abuse or contact. *See s*ec. 948.02 (prohibiting several different acts constituting sexual assault of a child); sec. 948.09 (sexual intercourse with a child age 16 or older); sec. 948.095 (sexual assault of a student by a school staff member); sec. 948.055 (forced viewing of or listening to sexual activity); sec. 948.06 (incest); sec. 948.07 (child enticement); sec. 948.08 (soliciting a child for prostitution); sec. 948.10 (exposing genitals or pubic area); sec. 948.11 (exposing child to harmful material, descriptions or narrations); and sec. 948.12 (possession

of child pornography). Each section prohibits a specific type of conduct.

Section 948.075(1r) is entitled "Use of a computer to commit a child sex crime" and prohibits using a "computerized communication system" to communicate with a child. The statute does not prohibit merely communicating with a child via telephone or mobile phone.

The only reported Wisconsin decisions interpreting section 948.075 have involved use of computer webcams and/or internet chat rooms. *See State v. Olson*, 2008 WI App 171, 314 Wis. 2d 630, 762 N.W.2d 393; *State v. Schulpius*, 2006 WI App 263, 298 Wis. 2d 155, 726 N.W.2d 706. Again, no case interprets the statute in the context of a defendant's use of a mobile phone lacking internet capability.

The legislative history of the statute does not provide much guidance. The Legislative Reference Bureau's September 3, 2004 Information Bulletin, entitled "Sex Crimes and Penalties in Wisconsin,"

(App.166-85), summarizes the statute. In doing so, the LRB expressly refers to "using a computer":

> **Use of a Computer to Facilitate a Child Sex Crime.** Section 948.075 prohibits the use of a computerized communication system to communicate with an individual who the person ***believes or has reason to believe*** has not attained the age of 16 years with intent to have sexual contact or sexual intercourse with the individual. In order to prove the person's intent to have sexual intercourse or contact with the individual he or she believes to be a child, the person must have performed another act, such as traveling, in addition to using the computer to communicate with the individual (Class D felony).

(*See* App.179) (emphasis added).

This language suggests the statute is intended to punish the stereotypical sex offender who goes online, searching for young children in chat rooms, on Facebook or other social media platforms. The language, "believes or has reason to believe," allows prosecution in cases where the "child" contacted by the defendant is actually an undercover officer. The requirement of another separate act – such as traveling to meet the child at a designated location - further

supports construing the statute as requiring more than merely communicating with the "child" via a mobile phone. Rather, the accused must use the computerized communication system to arrange for the intended sexual liaison between the defendant and the child.

Section 948.075 also is discussed in the Wisconsin Department of Justice's publication entitled "***Internet*** Crimes Against Children: Priority Needs for Our Top Priority: Kids." (R.186-213) (emphasis added). This publication, issued under the name of Wisconsin Attorney General J.B. Van Hollen, discusses the "Internet Crimes Against Children" Task Force, of which Wisconsin is a member, and begins with an executive summary discussing the perils ***of the internet***. (App.188) (emphasis added). The report also refers to the need for computer forensic experts to investigate matters involving "computer facilitated child sexual exploitation." (App.198-201). The report identifies statutes applicable to the "o***nline*** sexual exploitation of children. (App.205) (emphasis added).

Notably, the first paragraph leading into the discussion of section 948.075(1r), subtitled "'Luring' or Sexual Exploitation," refers to internet chat rooms and other web-based communications, undercover sting operations where officers pose as children leading to sexually suggestive chats, use of web cams, and invitations to meet for a sexual purpose and an actual effort to accomplish the sexual purpose. (App.209). The following paragraph states that section 948.075(1r) is one of several provisions that "directly apply" to those types of conduct. (Id.). The reports says nothing about communicating with a child via a mobile phone, landline or other communication device that is not connected to the internet.

Both the Legislative Reference Bureau Report and Attorney General Van Hollen's report interpret the reach of section 948.075 as being to communications involving the internet, requiring the use of a computer and some type of internet or online activity. Based on these interpretations, a defendant does not violate

section 948.075(1r) by communicating with a child via either a landline or a mobile phone without independent internet capabilities. Thus, based on the language of the statute, the Legislative Reference Bureau's Information Bulletin and Attorney General Van Hollen's report, section 948.075(1r) was intended to punish defendants who used the internet to commit a child sex crime. McKellips' mobile phone had no internet capabilities and the state presented no evidence that McKellips used the phone to access the internet, online chat rooms, or social media sites. Therefore, McKellips did not violate section 948.075(1r) as a matter of law and his conviction should be reversed and vacated.

B. Section 948.075(1r) Is Unconstitutionally Vague As Applied To McKellips.

Even if this Court determines that a mobile phone without internet capabilities is a "computerized communication system," McKellips' conviction still should be reversed because the statute is

unconstitutionally vague as applied to him. Although the statute on its face refers to "computerized communication," it does not sufficiently warn people wishing to obey the law that using a mobile phone without internet capability to contact a child violates the statute. Nor does the statute warn that communicating with a child on such a phone - even exchanging photos and texts – constitutes an intent to facilitate a child sex crime. As a result, McKellips was denied due process.

A criminal statute is unconstitutionally vague if it lacks either fair notice or proper standards for adjudication. *State v. Pittman,* 174 Wis. 2d 255, 276, 496 N.W.2d 74, *cert. denied,* 510 U.S. 845 (1993). "[W]hen there is doubt as to the meaning of a criminal statute, courts should apply the rule of lenity and interpret the statute in favor of the accused." *State v. Jackson*, 2004 WI 29, ¶12, 270 Wis. 2d 113, 676 N.W.2d 872, 875. Courts must look to the legislature's definition of a crime in construing a statute and not the common law definition. *State v. Genova,* 77 Wis. 2d 141, 145, 252 N.W.2d 380

(1977). "[C]rimes are exclusively statutory, the task of defining criminal conduct is entirely within the legislative domain." *State v. Baldwin*, 101 Wis. 2d 441, 447, 304 N.W.2d 742 (1981). A deprivation of due process can occur from retroactive judicial interpretation -- Monday morning quarterbacking -- of statutory language. *Elections Board of the State of Wisconsin v. Wisconsin Manufacturers & Commerce,* 227 Wis. 2d 650, 679-80, 597 N.W.2d 721 (1999).

Wisconsin has adopted a two-prong test to determine whether a statute is unconstitutionally vague. First, does the statute sufficiently warn persons "wishing to obey the law that [their] . . . conduct comes near the proscribed area?" And second, may those who must enforce and apply the law do so "without creating or applying their own standards?" *Pittman*, 174 Wis. 2d at 276. While a statute need not define with absolute clarity and precision what is and what is not unlawful conduct, it is void for vagueness if it is unduly ambiguous such that "one bent on obedience may not

discern when the region of proscribed conduct is neared, or such that the trier of fact in ascertaining guilt or innocence is relegated to creating and applying its own standards of culpability rather than applying standards prescribed in the statute or rule." *Id.* at 276-77. "If a statute can support two reasonable interpretations, a court ***must*** find the language of the statute ambiguous." *State v. Williams*, 198 Wis. 2d 479, 487, 544 N.W.2d 400 (1996) (emphasis added).

In other words, a law regulating conduct must give adequate notice of what is prohibited, so as not to delegate "basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Thus, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates essential due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

In the context of the facts of this case, section 948.075(1r) neither provides adequate notice nor is enforceable without the interference of the subjective, personal standards of the prosecution. The statute itself provides no definition of what constitutes a "computerized communication system." In fact, nowhere in Chapter 948 is even the broader term of "computer" defined. In the state's response to McKellips' motion to dismiss, the state urged the circuit court to adopt the definition of "computer" found in section 943.70(1)(am) -- a definition found ***only*** in section 943.70(1)(am) -- which is:

> "Computer" means an electronic device that performs logical, arithmetic and memory functions by manipulating electronic or magnetic impulses, and includes all input, output, processing, storage, computer software and communication facilities that are connected or related to a computer in a computer system or computer network.

Sec. 943.70(1)(am), *Stats*. It was this expansive definition that the circuit court ultimately relied upon in determining that the statute was not unconstitutionally vague. (R.48:13-14;App.155-56).

In fact, ***if*** it were necessary to turn to other chapters of the Wisconsin statutes in order to determine what might cause an individual to violate section 948.075, a more appropriate comparison would be to Chapter 947. Section 947.0125, *Stats*., is entitled "unlawful use of computerized communication systems" and prohibits the sending of messages on "an electronic mail or other computerized communications system." Although that statute does not expressly define "computerized communication system," it clearly equates such a system with email. Perhaps even more enlightening, Chapter 947 not only contains section 947.0125 discussing computerized communication systems, but also contains an entirely ***distinct*** statute referring specifically to telephones. Sec. 947.012, *Stats*.

While both Chapters 943 and 947 provide for interesting legal analyses as to how each chapter relates to section 948.075(1r), the mere fact that defining "computerized communication system" requires going

outside of Chapter 948 creates cause for concern as to the constitutionality of the statute as applied in this case. A clever legal analysis could utilize section 943.70(1)(am) for a definition broad enough to determine that the use of a high school student's graphing calculator could violate section 948.075(1r). Another equally reasonable legal analysis could rely upon sections 947.012 and 947.0125 for the assurance that no telephone would be included under the definition of "computerized communication system." Given the absence of any statutory definition and inconclusive result attained by reviewing comparable statutes, a lay person is hardly on notice as to what type of device subjects him to section 948.075(1r) and its mandatory minimum three-year prison sentence.

Simply put, the statutory language does not sufficiently warn a person in McKellips' position that a basic mobile phone without the internet capabilities common in iPhones and Smartphones, could be deemed a "computerized communication system," or that

making and receiving telephone calls and text messages on such a phone could constitute use of a "computerized communication system." Again, McKellips did not contact the complaining witness through an online chat room, email or social media. The communications did not arise through a website. They did not require using an internet provider such as Yahoo or AOL. McKellips would have no reason to even consider that use of his basic mobile phone could be construed as using a "computerized communication system." When facing the potential of extremely serious penalties, in this case forty years in prison, fundamental fairness requires adequate notice of what conduct violates the law.

Moreover, the second prong of the constitutional analysis, which the circuit court never considered, is not met in this case. By applying section 948.075(1r) to use of a mobile phone without independent internet capabilities, persons applying and enforcing the law are creating and applying their own standards based on

their own degree of computer savvy. Perhaps someone with sophisticated knowledge of the inner workings of mobile phones might conclude that they have some sort of microchip or computerized processor that allows them to work, but that is not the standard. *Connally* holds that a statute is unconstitutionally vague as applied where it is so vague that persons of "common intelligence" must guess at its meaning. *Connally*, at 391.

The language of section 948.075(1r) requires those enforcing the statute to guess as to whether a mobile phone without independent internet capabilities is a "computerized communication system." As a result, the circuit court looked to an entirely different statutory scheme for a definition of "computer," in order to provide a definition for this case.

Under that analysis, the use of a vast assortment of devices might subject a user to a violation of the statute. Vehicle navigation systems, smart pens, voice mail answering machines, children's toys and any of

dozens of other devices perform logical arithmetic functions, some of which include capability to interact – to communicate – with the user. Are they "computerized communication systems" as well?

Section 948.075(1r) is unconstitutionally vague as applied to McKellips. Therefore, McKellips urges this Court to vacate and reverse his conviction and to remand this case to the circuit court for entry of a judgment of acquittal as to Count 3.

II. The Circuit Court Improperly Admitted Other Acts Evidence Related To Other Women.

In the event that this Court finds that McKellips did violate section 948.075(1r) and upholds the constitutionality of the statute, this Court should reverse and remand this case for a new trial because the trial court improperly admitted other acts evidence contrary to section 904.04(b).

The *Sullivan* analysis sets the framework for analyzing other acts evidence:

1. Is the "other acts" evidence offered for an acceptable statutory purpose?

2. Is the evidence relevant to that purpose?

3. Is the probative value of the "other acts" evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence?

State v. Sullivan, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

It was the state's burden of production on the first two steps of the *Sullivan* analysis, *State v. Hunt,* 2003 WI 81, ¶53, 263 Wis. 2d 1, 666 N.W.2d 771; *State v. Rushing*, 197 Wis. 2d 631, 649, 541 N.W.2d 155 (Ct. App. 1995), yet no evidence ever was provided to McKellips or the circuit court that satisfied the first two prongs of *Sullivan*. Moreover, given the twenty-year time gap and the great dissimilarity between the conduct alleged by C.J.H. and the other acts testimony, the circuit court was simply wrong in concluding that its probative effect outweighed the prejudice to McKellips.

A. The Circuit Court's Ruling.

The circuit court, after acknowledging that propensity could not be a basis for admitting such evidence, ruled that T.S's testimony was not propensity evidence, citing the fact that McKellips had given gifts to both T.S. and C.J.H., instructed them not to tell their parents about the gifts, communicated privately with both T.S. and C.J.H., had physical contact with both of them and they were the same ages. (R.43:25-27;App.130-32). The court also noted that it had seen cases where the remoteness in time was greater than twenty years. (R.43:27;App.132). The court was not sure whether the other acts evidence had to involve a sexual assault or even had to be sexual in nature to be admissible, but still found other similarities it believed justified admission. (R.43:27-28;App.132-33). The court's explanation reflects a misunderstanding of *Sullivan* and other Wisconsin cases addressing propensity.

The circuit court then addressed the issues of relevance. The court first mentioned the state's "doctrine of chances" argument that recurrence means an act is less likely to be innocent. (R.43:29;App.134). Then, despite acknowledging that T.S.'s allegations did not involve sexual contact, the court stated that they fell within a permitted category of evidence of intent, motive or plan. (Id.). The court then stated, in a conclusory manner without explaining its reasoning, that the evidence had a probative value that would make the consequential fact or proposition more probable or less probable than it would without the evidence. (Id.). Based on that, the court found that the ***jury*** could conclude the evidence was relevant. Relevance, however, is a decision for the court under the *Sullivan* analysis, and to the extent that the circuit court determined that T.S.'s testimony was admissible because the jury might find it relevant, the court erroneously exercised its discretion, requiring reversal

of McKellips' conviction and a new trial. *See Sullivan*, 216 Wis. 2d at 773.

As for the weighing of probative value versus prejudicial effect, the circuit court weighed the state's argument that the absence of a sexual assault of T.S. made her testimony less prejudicial and the defense argument that admission of the twenty-year old evidence would brand McKellips a child molester. The court accepted the state's argument that the prejudicial effect of admitting the evidence would be outweighed by the probative value of the evidence, calling it a "very tough decision." (R.43:31;App.136). In reaching this conclusion, however, the court failed to explain what the probative value of the evidence was. (Id.).

B. The Other Acts Evidence Was Not Offered For A Permissible Purpose.

The state sought to call T.S. solely for the purpose of offering other acts evidence. The state's proffered purpose for the other acts evidence was to prove intent, opportunity, motive, and plan. (R.43:10-12). Yet, rather than engaging in a meaningful analysis

as to how the evidence was relevant to prove any of those purposes, the state merely couched the evidence in terms other than "propensity." The state relied on the "doctrine of chances" or the odds that the recurrence of an act increases the chance of a desired result. (R.43:11;App.116). Thus, the state argued that McKellips' plan was to have sexual contact with girls because of a sexual attraction and, the state concluded, if McKellips' motive was to have sexual contact with T.S., it is more likely he had the same motive with C.J.H. (R.43:11;App.116). T.S.'s testimony, which pertained to allegations that took place twenty years prior to the charged offenses, had the sole goal of convincing the jury that because McKellips engaged in conduct that the state claimed demonstrated a sexual attraction to girls twenty years ago, he did it again with C.J.H., despite the absence of any allegation of even attempted sexual conduct or contact with T.S.

The testimony had the desired effect. The jury found that McKellips had not had sexual contact with

C.J.H. during the year that they knew one another, as evidenced by the acquittals on the first two counts. Yet, somehow, even without the alleged sexual contact, the jury determined that McKellips had the intent to commit a child sex crime required in section 948.075(1r). Setting aside the alleged sexual contacts themselves based on the jury's acquittals on that conduct, there was a limited basis upon which the jury could have inferred McKellips' intent. T.S.'s improper propensity testimony made up a substantial portion of that evidence.

The state's true intent in seeking admission of this evidence was to assert to a jury that McKellips had a particular character trait of being an inappropriate coach, and that as such he was the "type" of individual more likely to have a sexual intent regarding his relationship with C.J.H.. Despite acknowledging that propensity is never a proper purpose for admission of other acts evidence, the circuit court erroneously exercised its discretion in admitting the epitome of propensity evidence in this case.

C. The Other Acts Evidence Was Irrelevant To Prove Intent, Opportunity, Motive, And Plan.

Step two of the *Sullivan* analysis, namely whether the other acts evidence was relevant, further illustrates that the state's motivation to admit propensity evidence and the court's error in admitting that evidence. The state did not allege that McKellips sexually assaulted T.S. (R.43:14). The circuit court questioned whether such allegations were necessary for the evidence to be similar enough to constitute other acts evidence. (R.43:27;App.132), and for good reason. The majority of the Wisconsin cases pertaining to the admissibility of other acts evidence in a sexual assault case involved evidence of prior sexual assaults. *See, e.g. State v. Veach*, 2002 WI 110, ¶15, 246 Wis. 2d 395, 401-02, 630 N.W.2d 256; *State v. Davidson*, 2000 WI 91, ¶10, 236 Wis. 2d 537, 543-44, 613 N.W. 2d 606; *State v. Plymesser*, 172 Wis. 2d 583, 593, 493 N.W. 2d 376 (1992); *State v. Opalewski*, 2002 WI App 145, ¶3, 256 Wis. 2d 110, 116, 647 N.W. 2d 348; *State v. Meehan*, 2001 WI App 119, ¶8,

244 Wis. 2d 121, 127-28, 630 N.W. 2d 722; *State v. Tabor*, 191 Wis. 2d 483, 487, 529 N.W. 2d 915 (Ct App. 1995). Those cases involved "other acts" of prior sexual conduct that is substantially similar to the offenses charged. Here, not one allegation put forth by T.S. involves illegal sexual conduct or any conduct that is sexual in nature.

Even in the few cases that examine prior verbal statements, as opposed to acts, the prior statements were at least sexual in nature, showing some kind of intent to have sexual contact with minors. *See*, *e.g., Day v. State*, 92 Wis. 2d 392, 404-405, 284 N.W.2d 666 (1979) ("the testimony of the three non-complaining witnesses … also established that the defendant either had or sought to have sexual intercourse with other young girls besides [the complainants] and that these acts occurred within a year's span"). Although the court referred to comments made to T.S. as having a design to engage in a "quasi-sexual" relationship

(R.43:28;App.133), there simply was no evidence that McKellips sought to have sexual contact with T.S.

In this case, the other acts evidence related to T.S. was that McKellips would hold her hand or "rub her leg" during the few occasions that he drove her home during middle school, and that he gave T.S. massages on the shoulder and neck area. T.S. also referenced "gifts," particularly a Bulls jacket, which she acknowledged McKellips also gave to his daughter at the same time. (R.71:184). T.S. mentioned "notes" she received from McKellips, but could not recall the specific content of the notes. (R.71:175-76). She stated that McKellips indicated he wanted to move to Hawaii with her after graduation, but she also stated that he wanted to take his daughter to Hawaii as well. (R.71:186). Throughout her direct examination, T.S. testified that McKellips made her "uncomfortable" and that he acted "inappropriately" or "improper." (R.71:174-76;181-83). At no point, however, either during pre-trial investigation or at trial, did T.S. ever

allege any behavior substantially similar to the allegations made by C.J.H.

McKellips' case is analogous to the allegations in *State v. Jeske*, 197 Wis. 2d 905, 541 N.W.2d 225 (Ct. App. 1995). In that case, the defendant was charged with two counts of first-degree sexual assault of a child who had not yet attained the age of 13. *Id.* at 907. The defendant was alleged to have had conversations of a sexual nature with the victim prior to touching her breasts and vaginal area. *Id.* at 907-908. The other acts evidence involved conversations of a similar nature -- but no sexual contact -- that had occurred with the victim's sister only months prior. *Id.* at 908. The Court of Appeals upheld the circuit court's decision to exclude the evidence on the grounds that the unfair prejudice substantially outweighed the probative value of the evidence. *Id*. at 915. The evidence was excluded despite the fact that the "other acts" occurred only months prior and were similar to the conversations the defendant was alleged to have had with the victim.

Even if T.S. had alleged anything similar to the claims made by C.J.H., these incidents were dissimilar to the charges against McKellips in almost every other respect and also remote in time. The similarity between T.S. and C.J.H. is that they were both players on McKellips' basketball team -- a category that could apply to any one of hundreds of students McKellips coached in over twenty years. If that alone was enough to link the two, then any one of hundreds of individuals would be permitted to testify as to her relationship with McKellips and whether she approved of every comment McKellips has made in the past twenty years.

In every other aspect, these allegations were far too distant and dissimilar to even have a basis to have been admissible. T.S.'s allegations were limited to her time in middle school, approximately 1991-1994. While the state cited *Opalewski* below to support the theory that the allegations were not too remote, *Opalewski* specifically examined the issue of how many opportunities were presented during the lapsed period

of time. *Opalewski*, at ¶20-21, 256 Wis. 2d at 122-23. In that case, this Court concluded it appeared as though the defendant took advantage of the opportunity to assault minor children with whom he shared a familial relationship on every occasion that that opportunity presented itself. *Id.*

Opportunity was also the focus in *State v. Kuntz*, 160 Wis. 2d 722, 747-48, 467 N.W.2d 531 (1991), and *Sanford v. State*, 76 Wis. 2d 72, 250 N.W.2d 348 (1977). In *Kuntz*, the defendant's arson-related actions were triggered by the ending of a marriage, and the prior acts (also involving arson) occurred on each of the previous occasions that his marriage was in jeopardy. *Id.* ("Because it is the break up of a marriage that apparently triggered Kuntz's arson-oriented acts, the defendant had few 'opportunities to repeat' this conduct during the sixteen years between the most remote acts.") In *Sanford*, the court found that the prior acts that had occurred one and half years prior were not so remote as to render them irrelevant, especially

considering the fact that the defendant was confined during the gap in time. *Sanford*, 76 Wis. 2d 72 at 82. The Supreme Court also noted that the allegations in that case occurred only a few days after he was released from confinement, "[t]hus the defendant returned to the same neighborhood to repeat the same plan or pattern of conduct at very nearly his earliest opportunity to do so." *Id.*

Adding the aspect of opportunity to the consideration of remoteness of time only strengthened the defense argument for exclusion in McKellips' case. For twenty years, he coached basketball teams filled with the same age girls as C.J.H. between the time of T.S.'s allegations and C.J.H.'s allegations. Opportunity presented itself almost every day in the form of hundreds of middle and high school-aged girls, and the only hint of any inappropriate conduct was a twenty-year-old allegation that T.S. was made "uncomfortable" by McKellips.

D. The Prejudicial Effect Of The Other Acts Evidence Substantially Outweighed Any Probative Value.

The third *Sullivan* factor echoes Wisconsin Rule of Evidence section 904.03, *Stats*., which provides that "[a]lthough relevant, evidence may be excluded if its probative value is 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." Thus, even if the Court finds that there is some miniscule probative value of the other acts evidence in this case, this case still must be reversed because the circuit court utterly failed to set forth any reasoning or analysis for its conclusory determination that the prejudicial value of the T.S. evidence was outweighed by the probative value of the evidence. *See Sullivan*, 216 Wis. 2d at 780-81. It is not enough for a court to state both parties' side of the argument, say it must make a decision, and then, after saying it is a tough decision, make a ruling.

1. The evidence lacked probative value.

The trial testimony of T.S. highlighted the fact that the other acts evidence lacked probative value and was admitted solely for the purpose of casting McKellips in a bad light. The state indicated in arguing the pretrial motion that "[t]he inference that can be drawn is that the defendant engaged in a prior sexual grooming to achieve sexual contact." (R.43:11). Yet this connection was shaky at best.

First, there was no evidence presented that in fact McKellips' alleged behavior with T.S. constituted "grooming." The state introduced neither any credible expert testimony to explain the concept of "grooming," to the jury nor expert testimony connecting McKellips' behavior with either C.J.H. or T.S. as "grooming" behavior.

Second, even if such expert testimony had been properly introduced, the "inference" the state drew was that McKellips intended to have sexual contact with T.S. Yet, despite having close, personal contact with T.S. for

many years ***after*** the alleged "grooming" behavior, McKellips never engaged in any sexual contact with T.S. If anything, the other acts evidence would be relevant to show that McKellips has a history of acting "inappropriately" with athletes ***without*** any sexual intent. Unfortunately, that is not how the state introduced and argued the evidence in this case.

The state offered no explanation, nor does one reasonably exist, as to why a feeling of being uncomfortable that occurred twenty years prior had any bearing on whether McKellips had an opportunity, intent, or motive to assault C.J.H. The evidence did not go to prove an intent or motive to be sexually gratified by middle-school or high-school aged children, because there was no testimony that McKellips was ever sexually gratified by T.S. The evidence did not go toward whether McKellips had an opportunity to commit a crime with C.J.H. twenty years later, either, because McKellips never actually committed a crime with T.S.

The circuit court erred when it concluded that the state met its burden of establishing that T.S.'s twenty-year-old allegations had any relevance to or bearing on whether McKellips committed a sexual assault with C.J.H. Thus, the circuit court erroneously exercised its discretion and improperly permitted the state to present the other acts evidence to the jury.

2. The "other acts" evidence was extremely prejudicial to McKellips.

The testimony of a former basketball player that McKellips made her feel "uncomfortable" had undeniable effect on the jury. Although the jury did not believe that the state proved McKellips engaged in sexual contact with or exposed himself to C.J.H., its verdict on the computer count evinced its belief that McKellips intended to have sexual contact with her. The jury heard testimony that, twenty years earlier, McKellips had a close relationship with another basketball player whom he coached, which the state characterized as an attempt to groom T.S., just as he had

"groomed" C.J.H. The testimony thus created the impression that McKellips was a child predator -- an assumption not supported by T.S.'s allegations alone. Nonetheless, this assumption allowed the jurors to fill in gaps missing from the state's case-in-chief. Even though the jury acquitted McKellips of any charges involving actual sexual contact between McKellips and C.J.H., the jury clearly "inferred" a sexual intent behind McKellips' conduct with C.J.H. from testimony of T.S.

Additionally, the age of the allegations was prejudicial to McKellips. T.S.'s testimony about her relationship with McKellips twenty years earlier allowed the state to create the unsupported, and unspoken, assumption that similar conduct continued throughout McKellips' twenty years of coaching. The concerns that a jury not be swayed by such a prejudicial "where there's smoke, there's fire" argument is at the root of Rule 904.04(b) and *Sullivan*.

3. The "other acts" evidence was confusing, misleading and caused a trial within a trial.

Even beyond the highly prejudicial nature of this evidence, T.S.'s allegations were confusing, misleading, and caused a "trial within a trial." McKellips was forced to deal with these allegations during cross-examination of T.S., as well as on direct examination of McKellips' daughter, Brooke Bargender, his wife, Constance McKellips, and in his own testimony. Moreover, although Brooke testified that her father gave similar gifts to both her and T.S. and that some of them resulted from him providing money for her and T.S. for a joint shopping trip, McKellips' ability to rebut T.S.'s testimony regarding those gifts was limited by Brooke's status as his daughter. In essence, McKellips was further prejudiced by the fact that his daughter was the only witness to many of his interactions with T.S.

Moreover, the jury may have improperly placed a significant amount of weight on T.S.'s allegations, concluding that the court would not have allowed the

evidence if it was not related to this case. Such a conclusion, coupled with a determination that T.S. was truthful, could lead the jury to rely on T.S.'s testimony in forming their decision as to McKellips' intent in his actions with C.J.H. Thus, not only did the admission of T.S.'s testimony impermissibly taint McKellips' character, but also it provided a springboard for the jury to reach its conclusion that McKellips intended to have sexual contact with C.J.H., thereby providing the state with a relaxed burden of proof as to the sexual intent element of section 948.075(1r).

4. The circuit court's admission of the "other acts" evidence tainted the jury's verdict.

As noted above, the circuit court's weighing and balancing of prejudicial effect and probative value was conclusory at best. One cannot deny that the admission of the T.S. evidence was highly prejudicial to McKellips. Only one contested charge in this case related to McKellips' intent or "bad purpose" and that was the count charging violation of section 948.075(1r). While a

mens rea component exists in both sections 948.025(1)(e) and 948.10(1), McKellips' defense to those charges was that the events themselves never occurred and, as such, intent was never truly at issue as to those charges. Intent was, however, at issue with section 948.075(1r). Regarding that charge, McKellips did not contest that a substantial number of contacts occurred between him and C.J.H., but maintained that those contacts were not for the purpose of sexual contact or intercourse. Rather, those contacts were the result of McKellips' position as C.J.H.'s basketball coach and her position as a team captain.

With respect to section 948.075(1r), the jury was tasked with determining not only that McKellips had the intention of having sexual contact with C.J.H. at some undetermined point in the future, but also that he intended for that contact to occur before her eighteenth birthday. Given the jury's rejection of C.J.H.'s testimony that sexual contact occurred, the only evidence that could possibly support the jury's verdict

is the improperly admitted T.S. evidence. Therefore, the circuit court's erroneous exercise of discretion tainted the jury's consideration of the evidence in this case, warranting reversal.

CONCLUSION

For all the foregoing reasons, defendant-appellant Rory A. McKellips respectfully urges this Court to reverse his conviction on section 948.075(1r) and to remand this matter to the circuit court for entry of a judgment of acquittal on grounds that his mobile phone was not a "computerized communication system" as that term was intended by the Wisconsin Legislature or, alternatively, because the statute is vague as applied to McKellips. Alternatively, McKellips urges this Court to find that the circuit court erroneously exercised its discretion in admitting "other acts" evidence related to T.S. and to remand for a new trial.

Dated this 30th day of June, 2014.

Respectfully submitted,

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CERTIFICATION PURSUANT TO SECTION 809.19(8)(d), *STATS*.

Pursuant to section 809.19(8)(d), *Stats.,* I certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a document produced with a proportional serif font. The length of this brief is 8,807 words.

_____

KATHRYN A. KEPPEL

CERTIFICATION PURSUANT TO SECTION 809.19(2)(b), *STATS*.

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with section 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;
(2) the findings or opinion of the circuit court; and
(3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that the record is required by law to be confidential and the portions of the record included in the appendix have been redacted to include only the initials instead of names of persons, specifically including juveniles and parents of juveniles, who are mentioned in the record, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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KATHRYN A. KEPPEL

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I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of section 809.19(12), *Stats.*

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A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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