STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014AP827-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RORY A. MCKELLIPS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE MARATHON COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL K. MORAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case can be resolved on the briefs by applying well-established legal principles to the facts; accordingly, the State requests neither oral argument nor publication.

STATEMENT OF THE ISSUES

1. It is a crime to use a computerized communication system to facilitate a child sex crime. Here, McKellips repeatedly made romantic overtures to a child through a cell phone. Did McKellips violate the law?

2. A statute is unconstitutionally vague when a reasonable person cannot understand the law. Here, McKellips challenges the law prohibiting the use of a computerized communication system to facilitate a sex crime, arguing that a cell phone is not a computerized communication system. Did McKellips show beyond a reasonable doubt that the statute is unconstitutional?

3. A circuit court's evidentiary rulings are reviewed for an erroneous exercise of discretion. Here, the circuit court admitted other acts evidence because it found the evidence was admitted for a permissible purpose, it was relevant and its probative value outweighed any danger of prejudice. Did the court erroneously exercise its discretion?

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

Defendant-Appellant Rory A. McKellips' statement of the case is sufficient to frame the facts and procedural history for this court's review. As Respondent, the State declines to present a full statement of the case, but will supplement facts as needed in its argument. *See* Wis. Stat. § (Rule) 809.19(3)(a)2.

ARGUMENT

I. McKellips was properly convicted of using a computerized communication system to facilitate a sex crime against a child.

McKellips mounts two challenges to the propriety of his conviction for using a computerized communication system to facilitate a sex crime against a child. One, he argues that his use of a cell phone to facilitate a sex crime is not encompassed by the statute. Two, he argues that the statute at issue is unconstitutionally vague. He is incorrect on both points.

A. Standard of review and relevant law.

Statutory interpretation is a question of law that this court reviews de novo. *See State v. Williams*, 2014 WI 64, ¶16, __ Wis. 2d __, 852 N.W.2d 467.

If a statute's language is plain, the inquiry ends and the language is applied. *See id.* ¶17. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

B. Wis. Stat. § 948.075(1r) prohibits the use of a "computerized communication system" to facilitate a sex crime against a child.

McKellips challenges the statute titled, "Use of a computer to facilitate a child sex crime." Wis. Stat. § 948.075. The relevant subsection reads:

> 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.

Wis. Stat. § 948.075(1r).

C. A cell phone is a computerized communication system under Wis. Stat. § 948.075(1r).

McKellips attempts to create confusion in the statute where there is none. McKellips relies upon sources extrinsic to the statute to support his argument that because his cell phone had no Internet capability, he could not have violated Wis. Stat. § 948.075(1r).[1] McKellips misreads the statute.

Nowhere in the statute does the word "Internet" appear. There is simply no requirement that a telephone have "independent internet

[1] McKellips' Br. at 21-24.

capabilities"[2] in order for a defendant to use the telephone to violate Wis. Stat. § 948.075(1r). The plain language of the statute requires only a "computerized communication system." Wis. Stat. § 948.075(1r). McKellips' cell phone, as the State proved, was a computerized communication system (68:11, 16-17). In addition, the State showed that McKellips' cell phone was capable of accessing the Internet and that it appeared McKellips had used this capability (68:17, 24, 84-85, 113-15). Thus, McKellips' argument regarding the meaning of the statute, as well as his cell phone's Internet capability, are without merit.

D. The use of a computerized communication system statute is not unconstitutionally vague.

1. Standard of review and relevant law.

The constitutionality of a statute is a question of law reviewed de novo. *State v. Smith*, 2010 WI 16, ¶8, 323 Wis. 2d 377, 780 N.W.2d 90.

Statutes are presumed constitutional. *See id.* When a statute is challenged for vagueness, the challenge asks whether a reasonable person, intent on obeying the law, can be expected to understand the law. *See State v. Jensen*, 2004 WI App 89, ¶30, 272 Wis. 2d 707, 681 N.W.2d 230. If the rules of statutory construction reveal a practical or sensible meaning, a criminal statute is not void for

[2] McKellips' Br. at 19-20.

vagueness. *See State v. Hahn*, 221 Wis. 2d 670, 677-78, 586 N.W.2d 5 (Ct. App. 1998). It is the defendant's burden to demonstrate beyond a reasonable doubt that the statute is unconstitutional. *State v. Cole*, 2003 WI 112, ¶11, 264 Wis. 2d 520, 665 N.W.2d 328.

2. McKellips has failed to demonstrate that the statute prohibiting the use of a computerized communication system to commit a sex crime against a child is vague.

McKellips argues that he "would have no reason to even consider that use of his basic mobile phone" could violate the statute.[3] He argues that the statute does not sufficiently warn people that the use of their cell phone to contact a child to commit a sex crime is illegal.[4] McKellips has not shown beyond a reasonable doubt that the statute criminalizing using a computerized communication system is unconstitutionally vague.

McKellips is correct that the definition of "computerized communication system" is not found in Wis. Chapter 948. In Wis. Chapter 943, the chapter that delineates crimes against property, a "computer" is defined as "an electronic device that performs logical, arithmetic and memory functions by manipulating electronic or

[3] McKellips' Br. at 32.

[4] McKellips' Br. at 26.

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." Wis. Stat. § 943.70(1)(am). The State submits that this definition is applicable to the "computerized communication system" referenced in Wis. Stat. § 948.075(1r).

Apparently McKellips does not like this definition so he directs the court to Wis. Chapter 947, which he deems without explanation "a more appropriate comparison."[5] But McKellips admits that the statute he cites, titled "Unlawful use of computerized communication systems," does not define a computerized communication system.[6] Thus, it is difficult to comprehend how this statute offers a "more appropriate" understanding of the definition of a computerized communication system.

McKellips' argument that the statute is unconstitutionally vague falls woefully short. By the statute's plain language, a person who uses any computerized system capable of communicating in order to engage in sexual contact with a child has violated the law. McKellips' mobile phone was a computerized communication system. It had logical functions used to compute data (68:11). It had memory functions (68:17). It even had Internet capabilities (68:17). Under Wis. Stat. § 943.70(1)(am), and under any lay person's understanding of a computer, the statute is not unconstitutionally vague.

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[5] McKellips' Br. at 30.

[6] McKellips' Br. at 30.

McKellips argues that a "clever legal analysis could utilize" Wis. Stat. § 943.70(1)(am) to criminalize the use of a calculator to facilitate a sex crime against a child and posits that under the State's view of the statute, a person may commit a crime by the use of a vehicle's navigation system.[7] This is nonsense. The State's view is simple: a defendant who uses a computer capable of communication to facilitate a sex crime against a child is guilty of Wis. Stat. § 948.075(1r).

McKellips' argument appears to rest on the underlying belief that only a computer with Internet access can be deemed a computer. Thus, under McKellips' view, before Al Gore invented the Internet, the world had no computers. This is simply not the case, nor is it a reasonable position to advance. And, at the very least, it is not a position that McKellips has demonstrated makes the statute unconstitutional beyond a reasonable doubt.

II. The circuit court properly admitted other acts evidence.

A. Standard of review and relevant law.

Whether to admit evidence at trial is within the discretion of the circuit court. *State v. Warbelton*, 2009 WI 6, ¶17, 315 Wis. 2d 253, 759 N.W.2d 557. A decision to admit or exclude evidence will be reversed only when the circuit court has erroneously exercised its discretion. *Id.*

[7] McKellips' Br. at 31, 33-34.

"In Wisconsin the admissibility of other acts evidence is governed by Wis. Stat. §§ (Rules) 904.04(2) and 904.03." *State v. Sullivan*, 216 Wis. 2d 768, 781, 576 N.W.2d 30 (1998). Other acts evidence "is not admissible to prove the character of a person in order to show that the person acted in conformity" with that character. Wis. Stat. § 904.04(2)(a). Other acts evidence may, however, be admitted to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* "This list is not exhaustive or exclusive." *Sullivan*, 216 Wis. 2d at 783.

To determine whether other acts evidence should be admitted, courts employ a three-step analysis. *Id.* Courts ask (1) whether the evidence is offered for a permissible purpose under § 904.04(2); (2) whether the evidence is relevant under § 904.01; and (3) whether the probative value of the evidence outweighs any prejudice or confusion, as contemplated by § 904.03. *See Sullivan*, 216 Wis. 2d at 783-90.

In a case involving a sex crime, particularly a sex crime with a child victim, courts employ the greater latitude rule to other acts evidence. *See State v. Hammer*, 2000 WI 92, ¶23, 236 Wis. 2d 686, 613 N.W.2d 629. "[T]he greater latitude rule permits more liberal admission of other crimes evidence, [but] such evidence is not automatically admissible." *State v. Davidson*, 2000 WI 91, ¶52, 236 Wis. 2d 537, 613 N.W.2d 606.

B. The circuit court properly admitted testimony from T.S. as other acts evidence.

1. The proceedings below.

Over McKellips' objection, the State sought to introduce other acts evidence from T.S. (43:5). The State wanted to demonstrate that McKellips had previously groomed a child for sexual purposes (43:7-16). Invoking both the greater latitude rule in cases involving sexual crimes against children, as well as the doctrine of chances,[8] the State argued that it should be permitted to introduce evidence that McKellips bought T.S. gifts, told her how special she was, and gave her a love letter, which he told her not to show to anyone (43:8-9). The State sought to introduce evidence that McKellips rubbed T.S.'s leg, held her hand and told her, "[I]f only I was 30 years younger" (43:9).

McKellips objected to this evidence, arguing that the evidence was not offered for a permissible purpose (43:18). He also argued that the evidence was not relevant because there was no evidence that his behavior with T.S. was sexual (43:17, 19). McKellips also argued that the evidence was prejudicial to him because the jury would find his behavior inappropriate (43:16-18).

[8] The doctrine of chances is the improbability of an event being repeated by coincidence. *See State v. Evers*, 139 Wis. 2d 424, 443, 407 N.W.2d 256 (1987).

The circuit court employed the three-part test in *Sullivan* (43:24). The court found that the evidence was admissible for a permissible purpose: to establish McKellips had intent, a motive and a plan to engage the girls in a close relationship to ultimately engage in sexual contact (43:25-28). The court found the allegations of the behavior of McKellips and C.H. and what occurred between McKellips and T.S. to be "strikingly similar" (43:27). The court found that the evidence was relevant because it tended to negate any innocent explanation for McKellips' behavior (43:28-30). Finally, the court found that any prejudice to McKellips was outweighed by the probative value of the evidence, in part because the behavior with T.S. did not culminate in sexual activity, which mitigated the prejudice to McKellips from the admission of the evidence (43:30-31).

At trial, T.S. testified that when she was in seventh and eighth grade, her relationship with her basketball coach, McKellips, made her feel uncomfortable (71:171-74).[9] T.S. testified that McKellips wrote her letters expressing his love for her and told her that one day he would take her to Hawaii (71:176).[10] T.S. stated that the letters she received from McKellips were the type a girlfriend would receive from her boyfriend (71:181). T.S. stated that McKellips would give her rides home

[9] T.S. did not testify as to her age at the time of trial, but she testified that she graduated from high school in 1998 (71:172). Presumably, then, she would have been around thirty-three at the time of trial. If she were between the ages of twelve and fourteen during the time period to which she testified, she was testifying to events that took place approximately twenty years earlier.

[10] On cross-examination, T.S. stated that McKellips wanted to take her to Hawaii with his daughter, Brooke, a friend of T.S.'s (71:176, 186).

and would hold her hand and rub her thigh (71:181-82). During these rides, T.S. testified, McKellips would say to her, "If only [you] were 30 years older" to which she would reply, "If only you were 30 years younger" (71:182). T.S. testified that when she was at McKellips' house, he would watch television and give her a massage to her upper shoulders and back (71:182-83).

2. The circuit court did not erroneously exercise its discretion in admitting T.S.'s testimony.

McKellips argues that the State submitted "no evidence" to satisfy the first two prongs of the *Sullivan* test.[11] He also argues that the prejudice to him outweighed any probative value because T.S.'s testimony concerned events twenty-years earlier and because the conduct with both girls was greatly dissimilar. *See* n.11. The State disagrees.

Whether to admit other acts evidence entails application of the three-part test: (1) is the evidence offered for a permissible purpose; (2) is the evidence relevant; and (3) does the probative value of the evidence outweigh the prejudice to the defendant? *See Sullivan*, 216 Wis. 2d at 783-90. Here, all three prongs were satisfied.

The State submitted evidence, and the court found evidence, that T.S.'s testimony was offered to prove McKellips' motive, intent and plan with regard to his conduct with C.H. McKellips

[11] McKellips' Br. at 35.

complains that the evidence was "the epitome of propensity evidence,"[12] but the State disagrees. The evidence of McKellips' inappropriate behavior with T.S. was admitted to show that McKellips also intended to pursue C.H. in a similar manner. Although McKellips complains that the State did not explain how T.S.'s discomfort with his attention is motive in the present case,[13] the State amply explained that it was admitted to show that McKellips bought C.H. the cell phone, and repeatedly contacted her behind her parents' backs, in order to groom her for sexual activity (43:7-16, 21-23). The fact that McKellips had previously acted in such an inappropriate manner was admissible to show he planned and intended to act illegally in the present case. *See State v. Evers*, 139 Wis. 2d 424, 437-43, 407 N.W.2d 256 (1987) (stating that the "doctrine of chances" allows the admission of other acts evidence to prove intent when the other acts are similar to the current act).

McKellips argues that his prior behavior was not substantially similar – in fact, he argues they are greatly dissimilar – because the behavior with T.S. did not result in a sex crime.[14] But McKellips ignores that he wrote T.S., one of the child-athletes that he coached, love letters that he told her not to tell anyone about, he bought T.S. gifts, and he gave her rides home when he would take the opportunity to touch her and say, "If only you were 30 years older" (71:176, 181-82). This evidence is substantially similar to the present

[12] McKellips' Br. at 40.

[13] McKellips' Br. at 50.

[14] McKellips' Br. at 35, 42-43.

case in which McKellips bought C.H. a cell phone behind her parents' back, told C.H. he loved her, gave her gifts, and texted and called her thousands of times (67:23, 39-40, 51, 78, 80-82; 68:58-60, 64-67). Certainly under the greater latitude rule, the circuit court did not erroneously exercise its discretion in finding the State sought to admit the evidence for a permissible purpose.

Although McKellips complains that the evidence of his previously inappropriate behavior with T.S. was not relevant to the charges in the present case,[15] he is mistaken. McKellips complains of his conviction for the use of the cell phone to facilitate a child sex crime. Thus, the issue before the jury was whether his behavior in buying C.H. a cell phone behind her parents' back, calling her pet names via text, contacting her thousands of times on the illicit cell phone, telling C.H. that he loved her via text was enough to prove him guilty of the crime. McKellips' defense was that his behavior was purely that of a devoted and sensitive coach who believed his athlete was in danger of harming herself (69:82-87, 118-25). The fact that McKellips had acted so inappropriately previously was relevant to whether his unusual actions at issue had an innocent explanation.

Finally, McKellips' contention that the prejudice to him from T.S.'s testimony outweighed its probative value is without merit. He argues that the State failed to prove the probative value of the evidence, the testimony created a trial within a trial and the only evidence in support of

[15] McKellips' Br. at 42-44.

the jury's verdict was the testimony from T.S.[16] McKellips is wrong.

The probative value of the evidence was amply explained above: it was relevant to show McKellips' intention with his communication with C.H. The excessive communication was not that of a thoughtful and concerned coach but instead that of a man preying on a vulnerable child. The evidence did not create a trial within a trial as T.S.'s testimony took not more than seventeen pages of transcript out of a trial that lasted five days (71:171-87). Even if the testimony offered to rebut T.S.'s assertions, which came from Connie McKellips and Brooke Bargender's testimony – McKellips' wife and daughter, respectively – is taken into account, the amount of time devoted to the issue was minimal (68:125-38; 69:15-19, 34-36). Finally, McKellips is woefully wrong when he says that "the only evidence that could possibly support the jury's verdict is the improperly admitted T.S. evidence."[17] He argues this because the jury acquitted McKellips of the sexual assault and exposure charges.[18] McKellips again ignores the evidence.

The evidence showed that McKellips had repeated contact with C.H., a fifteen-year-old high school freshman,[19] through his cell phone in 2010-11 (67:12-13; 68:54-55, 58-60, 64). When Jill Belter, C.H.'s mom, found out that C.H. was

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[16] McKellips' Br. at 38, 53, 55-56.

[17] McKellips' Br. at 55-56.

[18] McKellips' Br. at 55.

[19] C.H. was born in April 1996 and was a freshman during the 2010-11 school year (67:12-13).

speaking to McKellips on her cell phone, Belter told C.H. that the conversations were not acceptable and McKellips should call their home if he wanted to talk to C.H. (67:33). C.H. relayed this information to McKellips (67:34). McKellips, who was in his fifties at the time, decided that this meant he should buy C.H. a secret cell phone (67:34, 39; 69:65, 83).

After McKellips clandestinely delivered C.H. the cell phone, he and C.H. continued to communicate with one another without C.H.'s parents' knowledge (67:39-42). The two exchanged thousands of communications during an approximate nine or ten month time span (68:54-67). McKellips called C.H. "baby doll" and "sweetheart" (67:51). McKellips gave C.H. a necklace and a blanket; he bought her family presents, as well (67:52-53, 80-82). McKellips texted C.H., "I love you, baby doll" (67:78). C.H. sent McKellips three pictures of herself in her bra and underwear (67:89).

When C.H.'s dad found the secret phone, C.H. alerted McKellips (67:90-92). McKellips then tried to contact Belter and C.H.'s stepdad by calling both of their cell phones and the family's land line (71:87; 69:102-03). But when McKellips reached Belter, he strangely did not mention the extra phone and instead offered an extra ticket to a baseball game (71:87-88; 69:103). When police approached McKellips and asked him for his phone, he lied and said that he had lost it (68:99; 69:104-05, 146). All of this is substantial evidence that McKellips is guilty of using a computer to facilitate a sex crime against a child. It is incredible to suggest that T.S.'s testimony is the "only" evidence of his guilt.

The probative value of T.S.'s testimony outweighed any danger of prejudice here because the value of the testimony was high – it demonstrated the lack of an innocent explanation – and the danger of prejudice was small given that the behavior, while inappropriate, did not actually culminate in a crime. In sum, the circuit court properly exercised its discretion in evaluating the evidence and admitted it as other acts.

CONCLUSION

For the foregoing reasons, the State respectfully requests this court affirm the judgment of conviction.

Dated this 3rd day of October, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,361 words.

Dated this 3rd day of October, 2014.

_____
Katherine D. Lloyd
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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.

Dated this 3rd day of October, 2014.

_____
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