STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs. **Appeal No. 2014AP000827-CR**

RORY A. McKELLIPS,

Defendant-Appellant.

REPLY 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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REPLY ARGUMENT

I. McKellips Did Not Violate Section 948.075(1r).

The core issue in this appeal is the proper interpretation of "computerized communication system" as used in section 948.075(1r), *Stats*. The state begins its discussion by criticizing McKellips for attempting to create confusion as to the meaning of the statute where none exists and for relying on "extrinsic sources" to support his argument that his phone was not a computer under the statute. This argument ignores that the Legislature did not define the phrase "computerized communication system" either in section 948.075 or anywhere in the definition section of Chapter 948. Thus, because the plain meaning of the phrase is unclear, it is necessary to turn to extrinsic sources, an Information Bulletin issued by the Legislative Reference Bureau and a Department of Justice publication discussing internet crimes against children, both of which summarize and explain section 948.075(1r).

A. McKellips' Cell Phone Was Not A "Computerized Communication System."

The state flatly asserts there is no confusion as to the meaning of the statute and that McKellips' cell phone was a "computerized communication system." The state then asserts that even if internet capability were required, the state showed that McKellips' phone was capable of accessing the internet and it "appeared" McKellips did so. The state is simply wrong on the law and the facts.

At pages 4-5 of its brief, the state argues that because section 948.075(1r) does not mention the word "internet," there is no requirement that a telephone have independent internet capabilities in order to qualify as a "computerized communication system." If omission of a term establishes the statute's meaning, then how can a statute that does not mention the words "telephone," "cell phone," or even simply "phone" be applied to a defendant's use of a cell phone? The

statute contains no indication that ***any*** kind of telephone falls under the scope of the statute.

The state fails to challenge McKellips' argument that the only reported Wisconsin decisions interpreting section 948.075 have involved a defendant's use of the internet. *See State v. Bvocik*, 2010 WI App 49, 324 Wis. 2d 352, 781 N.W.2d 719 (email and website-based communications); *State v. Olson*, 2008 WI App 171, 314 Wis. 2d 630, 762 N.W.2d 393 (web cameras); *State v. Schulpius*, 2006 WI App 263, 298 Wis. 2d 155, 726 N.W.2d 706 (internet conversations). The state also ignores the context for section 948.075(1r) provided by the publications mentioned above, both of which establish that section 948.075(1r) was enacted to protect children from individuals taking advantage of the internet to easily communicate with anonymous minors and from the perils of online sexual exploitation. Nothing in these publications even remotely suggests that section 948.075(1r) was intended to apply to communications via a cellular phone without accessing

the internet. Faced with no factual or legal basis to challenge this argument, the state is silent.

Instead, the state first flatly asserts that internet capabilities are not required to commit a violation of section 948.075(1r), without citing any authority or providing any argument. Then, the state argues that "McKellips' cell phone was capable of accessing the Internet and that ***it appeared*** McKellips had used this capability." (State's Brief at 5). This is an incorrect recitation of the evidence.

The state purports to support its conclusion with the testimony of two witnesses. The owner of a cell phone repair business, who was called as an "expert" despite having had no educational experience related to the use or function of cellular phones and never testifying previously as an expert, testified regarding the mechanics of McKellips' model cell phone. Officer Matt Wehn testified as to his ***belief*** that McKellips had downloaded picture messages sent by the victim. At no point did either the "expert" or Officer Wehn (or any

other witness for that matter) testify that McKellips could access websites, chat rooms, video chat or any other usage commonly associated with child sex crimes through this phone. Moreover, neither the "expert" nor Officer Wehn actually knew whether McKellips did, in fact, utilize any computer functions, including opening picture messages, on the phone.

The "expert" testimony the state relies upon was fairly limited: the prosecutor took the witness through the manual for McKellips' phone to determine what functions it could perform; the phone had "limited internet" in that it could function off the internet ***if*** certain settings were used; and when something is physically downloaded, those minutes are deducted from one's phone plan. (R.68:11-17). The witness acknowledged the distinction between the data side of a phone network, requiring a smart phone to access the internet, emails and picture messages, and the voice side, which involved phone calls, voice mail messages and text messaging. (R.68:20-22). He also testified that

one could access the internet to download picture messages via McKellips' phone but acknowledged that even though a phone might have functions allowing sending or receiving photo messages, a person is not accessing the "data side" of a phone network if he chooses not to download such messages. (R.68:24-25). He did not testify that any data side functions had been used. At best, his testimony established that McKellips had to turn on specific settings to access data via his phone.

Officer Wehn admitted he was not an expert in cell phones and did not interview any individuals or conduct any independent investigation relative to the actual meaning of McKellips' phone bills. (R.68:109,114). His testimony on this issue was limited to his speculation that because a phone number and message were listed on McKellips' phone records, McKellips must have been billed for them, and therefore must have downloaded them, even though he conceded that "zero" minutes were billed on McKellips'

phone bill for downloading picture messages. (R.68:111,114-15).

The state presented no authorities supporting its construction of section 948.075(1r), ignoring both government publications indicating that the Legislature's intent in enacting the statute was to protect children from internet online predators. No evidence establishes that McKellips accessed the internet on his phone or otherwise utilized a "computerized communication system." McKellips did not violate section 948.075(1r) as a matter of law and therefore his conviction should be reversed and vacated.

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

The state's entire argument as to whether section 948.075(1r) is unconstitutionally vague hinges upon the definition of "computer" found in section 943.70(1)(am). The state asserts "[a]pparently, McKellips does not like this definition" and criticizes

McKellips' reliance on section 947.0125, *Stats*. The question is not whether McKellips "likes" the definition found in Chapter 943; the question is why the state presumes the broad definition found in Chapter 943 applies to section 948.075(1r) at all. The state has offered no reason for why the definition of a different word -- "computer" -- found in an entirely different chapter should apply to section 948.075(1r).

Presumably, the state advocates for section 943.70(1)(am) because it provides the broadest definition of "computerized communication system" possible, a definition broad enough to cover even a microwave oven under the term "computer." A microwave sends electric magnetic impulses (R.68:23), has logical functions used to compute data as it uses sensors to determine much how longer a particular food should be cooking. It has memory functions in that it can recall that certain foods should be cooked for a certain amount of time. It also performs arithmetic functions by counting down from a starting number,

using a formula to calculate the amount of time to defrost a certain inputted weight of food, etc. Thus, by the state's logic, it is a computer.

Admittedly, applying the definition in section 943.70(1)(am) to a microwave is a unique legal argument; however, that it can be applied shows the sweeping scope of that definition. Combine that with a defendant who tells a minor that when the microwave beeps he or she should join the defendant in the bedroom (communication), and the state's definition of "computerized communication system" has been met, opening a defendant up for what is now a mandatory minimum prison sentence.

While "apparently" the state "likes" the definition found in section 943.70(1)(am), more appropriate context can be found in other statutes utilizing the exact term "computerized communication system" –- a term notably absent from section 943.70. Chapter 947 punishes two separate acts with two separate statutes: the "unlawful use of a ***telephone***" in

section 947.012, and the "unlawful use of ***computerized communication systems***" in a separate statute, section 947.0125. The Legislature's intentional distinction between the use of a telephone and the use of a "computerized communication system" supports the conclusion that a phone, in and of itself, is not a "computerized communication system" under section 948.075(1r).

In the only other statute where "computerized communication system" is used, the phrase clearly requires connection with the internet. In a provision governing advertising related to adoption, the Children's Code provides:

> "Advertise" means to communicate by any public medium that originates within this state, including by [...] ***or by any computerized communication system, including by electronic mail, Internet site, Internet account, or any similar medium of communication provided via the Internet.***

Sec. 48.825(1)(a), *Stats.* (Emphasis added).

These statutes establish that the Legislature recognized the distinction between phones and

"computerized communication systems." They also establish the internet is an integral part of the Legislature's understanding of "computerized communication system."

The fact that one statute creates two reasonable yet divergent views of the definition of "computerized communication system," one of which would include McKellips' conduct in this case and one of which would not, highlights the ambiguity in the statute. The parties' reliance on two different statutes to define the phrase is exactly why the Court should find that the statute is ambiguous. *State v. Williams*, 198 Wis. 2d 479, 487, 544 N.W.2d 400 (1996) ("If a statute can support two reasonable interpretations, a court must find the language of the statute ambiguous.") One bent on obeying section 948.075(1r) is unable to discern when he is nearing the proscribed conduct -- is it when using a typical computer? A tablet? A smart phone? A cell phone without internet? A landline phone? A pager? Section 948.075(1r) leaves an individual guessing as to

whether his conduct is proscribed by the law and as such it is ambiguous. *State v. Pittman*, 174 Wis. 2d 255, 276-77, 496 N.W.2d 74, *cert. denied*, 510 U.S. 845 (1993).

The state argues that McKellips' view of a "computerized communication system" must be discounted because "under McKellips' view, before Al Gore invented the Internet, the world had no computers." (State's Brief at 8). The internet was invented in the 1980s, and first came to use in the 1990s. Section 948.075(1r) was not created until 2001. Thus the state's argument is flawed not only for its ill attempt at humor, but also because this statute never existed in a world without the internet. Early computers had no access to chat rooms, instant messaging, or other ways of easily communicating with minors and were not what the Legislature had in mind when it created section 948.075(1r) in 2001.

Section 948.075(1r) supports multiple interpretations of what conduct is proscribed by the statute. Therefore, the statute is unconstitutionally

vague as applied and McKellips' conviction should be overturned.

II. The Circuit Court Improperly Admitted Other Acts Evidence.

In responding to the McKellips' argument that the circuit court improperly admitted other acts evidence that was over twenty-years old, the state contends admission was proper under a combination of the "doctrine of chances" and the "greater latitude rule," under the claimed purposes of motive, intent, and plan. (State's Brief at 12-14). To the contrary, the other acts evidence was not offered for a permissible purpose, was not probative, and was highly prejudicial and should have been excluded.

The "doctrine of chances" is the theory that, on the issue of intent, the fact that something has happened before makes it less likely that the intent is innocent the second, third, or fourth time around. As explained in the footnotes in *State v. Sullivan*, 216 Wis. 2d 768, 787 n.16, 576 N.W.2d 30 (1998), "[o]ne accidental discharge of a hunter's gun in the direction of the companion is

plausible. However, if two shots from the gun narrowly miss the companion and a third shot kills the companion, 'the immediate inference… is that [the hunter] shot at [the companion] deliberately.'" (internal citations removed).

The doctrine of chances does not establish probative value in this case. If this were a case where McKellips' defense was that he did have sexual contact with C.J.H. but was unaware she was a minor, and the exact same circumstances had occurred previously with T.S., then the doctrine of chances certainly would apply, subject to overcoming prejudice. Here, however, there was no prior alleged sexual assault; the only ***chance*** that was increased by introducing T.S.'s testimony was that McKellips had previously made individuals feel "uncomfortable."

The state argues that T.S.'s testimony was probative to show that McKellips' intent in buying C.J.H. gifts and paying attention to C.J.H. was "in order to groom her for sexual activity." (State's Brief at 13).

The state attempts to make an "If A, then B" type of argument; if McKellips paid attention to T.S. in order to have a sexual relationship with her, then the attention he paid to C.J.H. must mean that he intended to have a sexual relationship with her, too. The problem with this argument is the missing link: despite substantial contact and many opportunities over many years, McKellips and T.S. never had sexual contact. The logic that would complete the formula is missing and, as a result, the probative value of the evidence is missing, too.

The state also argues that because McKellips had previously acted in an "inappropriate" manner, the evidence was admissible to show he intended to act in an "illegal" manner in the present case. (State's Brief at 13). This rationale is akin to arguing that because a defendant had previously been convicted of disorderly conduct -- acting in an "inappropriate" manner -- that conviction should be admissible to show that the defendant is guilty of a substantial battery that occurred twenty years later -- acting in an "illegal" manner. The

doctrine of chances should not be read to support the admission of ***any*** prior bad act, regardless of remoteness in time, opportunity, and similarity in conduct. Yet, that is exactly what the state attempts to accomplish here. No Wisconsin appellate court has upheld the admission of other acts evidence under circumstances similar to this case, despite the existence of the doctrine of chances and the greater latitude rule.

The other acts evidence in this case was far too attenuated to be probative. Not only did the alleged behavior occur twenty years prior, but McKellips had ample opportunities to engage in this type of behavior between the time that he coached T.S. and the time that he coached C.J.H. McKellips coached basketball every year for twenty-seven years prior to the charged offense. (R.69:66). He was alone with both middle- and high-school students on an almost daily basis during basketball season, from practices, to games, to out-of-town tournaments, to basketball camps during the summer. Out of that entire twenty-seven year history,

the state was able to come up with ***one*** prior student to provide other acts testimony; that student had been coached by McKellips twenty years prior and the ***most*** she was able to state was that McKellips made her feel "uncomfortable." Other than C.J.H.'s allegations -- for which McKellips was acquitted -- no student in twenty-seven years has alleged that McKellips had sexual contact with her.

The admission of T.S.'s evidence not only was improper, it also was extremely prejudicial to McKellips, which was evidenced by the fact that although the jurors acquitted McKellips of actual sexual contact with C.J.H., they convicted him of the "bad intent" of having sexual contact with her at some indeterminate point in the future. As the state largely ignored McKellips' prejudice argument in its response (State's Brief at 17), McKellips will rely on his initial brief and will not repeat his argument here.

The state's argument is essentially that McKellips made one student out of the hundreds that he coached

feel uncomfortable twenty years prior to the charged offense, so therefore he is the type of individual who would commit the unrelated charged offenses. This is a classic example of propensity evidence that created an impermissible taint, requiring remand and a new trial.

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 ____ day of October, 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 2,827 words.

_____

KATHRYN A. KEPPEL

CERTIFICATION PURSUANT TO SECTION 809.19(12)(f), *STATS*.

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.*

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.

_____

KATHRYN A. KEPPEL