STATE OF WISCONSIN

IN SUPREME COURT

No. 2014AP827-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

RORY A. MCKELLIPS,

Defendant-Appellant.

ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS REVERSING A JUDGMENT OF THE MARATHON COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL K. MORAN, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

BRAD D. SCHIMEL
Attorney General

KATHERINE D. LLOYD
Assistant Attorney General
State Bar #1041801

Attorneys for Plaintiff-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7323(608) 266-9594 (Fax)
lloydkd@doj.state.wi.us

TABLE OF CONTENTS

CASES CITED

Page

Page

Page

STATUTES CITED

STATE OF WISCONSIN

IN SUPREME COURT

No. 2014AP827-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

RORY A. MCKELLIPS,

Defendant-Appellant.

ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS REVERSING A JUDGMENT OF THE MARATHON COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL K. MORAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with any case this court has accepted for review, oral argument and publication are appropriate.

STATEMENT OF THE ISSUES[1]

1. What is the proper interpretation of Wis. Stat. § 948.075(1r), including the term "computerized communication system"?

    a. Does the use of a cellular telephone to send text messages, make telephone calls, or leave voicemail messages constitute the use of a computerized communication system?

    b. Must an individual use the data transmission capabilities of a cellular telephone or otherwise use the Internet to constitute the use of a computerized communication system?

2. Is Wis. Stat. § 948.075(1r) unconstitutionally vague as applied and interpreted by the circuit court because persons of ordinary intelligence would not understand that the use of a mobile phone that has no independent Internet capabilities would constitute the use of a "computerized communication system" in violation of the law?

3. Was the jury instruction regarding the charge of violating Wis. Stat. § 948.075 an accurate statement of the law? Is asking whether the cellphone constituted a computerized communication system equivalent to asking whether the cellphone constituted a component of a computerized communication system?

---

[1] The State addresses all of the issues as outlined in this Court's order granting the petition, but has altered their order slightly for ease of understanding.

4. If the jury instruction in this case was erroneous, was the error harmless? As a matter of law, can a new trial in the interest of justice be granted on the ground that the real controversy was not fully tried based on a forfeited challenge to a jury instruction where the erroneous instruction was harmless error?

5. Did the court of appeals erroneously exercise its discretion by granting a new trial in the interest of justice without analyzing whether this is an exceptional case that warrants the extraordinary remedy of discretionary reversal?

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

The State charged Rory A. McKellips with repeated sexual assault of a child, CH, from May 2011, through August 2011 (1). McKellips was also charged with exposing his genitals to CH, the use of a computer to facilitate a sex crime and obstruction (1).

At trial, CH testified that at some point during the summer of 2010, before she began her freshman year in high school and when she was fourteen years old, she learned that McKellips, who was approximately 54 years old at the time,[2] was going to be the new coach of her high school basketball team (67:12-13, 16-17). CH testified that during the 2010-11 basketball season, she communicated with McKellips outside of basketball, but that their talks were focused mainly on basketball and CH's role on the team (67:22-23). CH testified that during one of these conversations, though, McKellips

[2] At trial in June 2013, McKellips testified that he was then 56 years old (69:65).

ended their phone call by saying, "I love you," which she testified she thought was "really weird," but also"didn't really think anything of [] at the time" (67:23).

According to CH, her communication with McKellips increased after basketball season was over (67:27). CH testified that in April and May 2011, she and McKellips talked to each other once every couple of days (67:27). CH testified that their conversations became more personal (67:28-29). CH stated that she talked to McKellips on the telephone, but communicated with him more frequently by text messages (67:29-30). CH testified that in May 2011, she went to a basketball tournament in Minnesota with her mom (67:32). According to CH, while at the tournament, she was talking to McKellips on her cellphone when her mom asked her with whom she was speaking (67:31-32). CH testified that when CH relayed that she was talking to McKellips, her mom told her to get off of the phone (67:32). CH stated that her mom later received a cellphone bill in which she learned that she had incurred roaming charges as a result of the contacts between CH and McKellips while CH was at the tournament (67:32-33). According to CH, when her mom learned about this, she told CH "that the conversations on [her] cellphone weren't acceptable" (67:33). CH testified that her mom told her that McKellips was her coach and that he could call her on their home phone if he wanted to talk to her (67:33).

CH testified that she then told McKellips that same day that her mom received the cellphone bill that "she seen that [CH] had roaming charges, and that he needed to call the home phone from now on and not contact me on my cell phone" (67:34). According to CH, McKellips told her that he would get her a cellphone so that he would be able to contact her (67:34). CH stated that on June 10, 2011, McKellips attended her softball game and afterwards met her family at Applebee's (67:38-39). CH testified that McKellips then gave her a bag of stuff when her mom and stepdad were not present (67:15, 39-40). CH

stated that when she later looked in the bag, she found a red Motorola flip phone (67:40). CH testified that the phone was a TracFone, which meant it had no specific carrier and minutes had to be entered in order to use it (67:40). According to CH, her parents did not know that McKellips had given her the cellphone (67:40). McKellips, too, admitted that he bought CH a phone, but he claimed that CH asked him to do so (69:84, 99, 118-19). McKellips agreed, though, that CH's parents did not know about the new cellphone (67:40; 69:84-85).

CH testified that the day after she received the TracFone from McKellips, she tore her ACL during a basketball tournament (67:43). CH testified that she called McKellips after she had hurt her knee and he told her that she should come with him and his wife, Connie, to his grandson's baseball game that night (67:45; 69:15). CH testified that her mom then dropped her off at McKellips's house (67:46). CH testified that she was "crushed" about her injury, but that McKellips "reassured [her] that [she] would be okay, that [she] would have someone that would help [her] make sure that [she] would be at the same level as everybody else" (67:47). CH testified that when they were leaving for the baseball game, McKellips kissed her on the cheek (67:48).

CH testified that after her injury, her communication with McKellips increased again (67:49). CH testified that one day, McKellips picked her up from school and brought her to his house so that he and Connie could make pies with her (67:54-56). CH stated that when they arrived at McKellips's house, Connie was not there and the pies were "basically already made" (67:56). CH testified that she and McKellips were in the living room when McKellips "leaned over and kissed [her], and then he was on the left side of [her], and he reached over and he put his hands underneath [her] clothing, [her] underwear, [her] underwear line" (67:58). CH testified that while she was seated, McKellips got in front of her, pulled

his pants and underwear down and put his hands on her head (67:59-60). CH stated that she had her mouth on McKellips's penis, which was hard (67:59-60). CH testified that fluids came out of McKellips's penis (67:60). When asked how she reacted to that, CH testified, "I didn't really know what it was. It was my first sexual experience ever, and I didn't know how to react" (67:60). CH testified that McKellips also touched her vagina with his hands and his mouth (67:60).

CH testified that when she went on a family vacation at the end of June, she used the secret cellphone to communicate with McKellips without her parents' knowledge (67:50-51). CH testified that McKellips began to call her "baby doll" and "sweetheart" (67:51). In early July 2011, according to CH, McKellips came over to CH's mom's house and dropped off some vegetables (67:67-69). CH testified that McKellips then kissed her, put his hands on top of her underwear, and took her hand and put it on his erect penis (67:68).

CH testified that on July 12, 2011, she had surgery to repair her knee (67:50, 52). CH stated that on the day that she had surgery, McKellips came to her house and brought her "a necklace, a blanket and a Buddha" (67:52-53). CH stated that the necklace McKellips gave her had an owl on it and he told her that she "was his eyes and ears" (67:64). CH said that between the time she went over to McKellips's house to make the pies and the day of her surgery, she and McKellips communicated more than once a day through texting or calling through the secret cellphone (67:65-66).

CH testified that on July 29, 2011, McKellips was hosting a fish fry at a bar in Mosinee (67:70). Before the fish fry, according to CH, McKellips picked CH up and brought her to his house (67:72-73). CH testified that while she was at McKellips's house, McKellips touched her breasts and her vagina (67:74-75). CH said that she put her mouth on

McKellips's penis (67:75). At trial, CH read a text message sent from McKellips's phone to her phone from the early morning of July 30, 2011, that said, "I love you, baby doll" (67:78). CH then read her text response, "Good morning," which was followed by another from her one minute later that read, "I love you" (67:78). CH testified that she next received a message from McKellips at 6:03 a.m. on July 30, 2011, that said, "Morning. Beautiful day yesterday" (67:78).

CH stated that in August 2011, she attended a family reunion in Mosinee and that McKellips, who also lived in Mosinee, told her that he and Connie would like her to come over to their house to visit them (67:84-5). CH testified that she convinced her mom to let her leave the reunion to walk over to McKellips's house (67:85). According to CH, when she got to McKellips's house, McKellips was there, but Connie was not (67:85). CH testified that when she arrived, McKellips pulled his pants down and she put her mouth on his penis (67:85).

CH testified that, upon McKellips's request, and throughout the time that she had the phone, she took approximately seven to ten pictures of herself in her bra and underwear using her cellphone and sent the pictures to McKellips's cellphone (67:89-90). CH stated that McKellips would say "thanks" or "I liked your picture" after she sent them (67:90).

On September 5, 2011, CH's dad, TH, found the secret TracFone that McKellips had bought for CH (67:90; 71:18-19). CH testified that once this happened, she texted McKellips that her dad had found the phone and that "it was over" (67:92). TH testified that he called the police the next day (71:36-37). When the police came to talk to McKellips at his workplace on September 9, 2011, McKellips hid his cellphone from police, telling them that his phone had fallen into a coal pit (68:99;

69:101-05). At trial, McKellips admitted that by doing so, he obstructed justice (69:105).[3]

At trial, the evidence established that CH's phones and McKellips's phones had thousands of contacts between them during the time periods at issue (68:51-85). Officer Matt Wehn testified that from December 18, 2010, through July 27, 2011, McKellips's and CH's phones had contact with one another 8324 times (68:60; 64-65). From June 10, 2011, to July 27, 2011, the cellphone McKellips bought for CH and McKellips's cellphone contacted one another 2426 times (68:64-65). During this same period, McKellips's cellphone received 1119 texts from CH's cellphone and McKellips sent 738 texts to CH's cellphone (68:65).

At the close of trial, the circuit court gave the jury its instructions (69:169-83). Regarding a violation of Wis. Stat. § 948.075, which prohibits the use of a computerized communication system to communicate with a person under the age of sixteen with the intent to have sexual contact or intercourse with that person, the court instructed the jury, in relevant part,

> Before you may find the defendant guilty of this offense, the state must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.
>
> Number one. That the defendant used a computerized communication system to communicate with an individual.

[3] McKellips testified that after the police had approached him at work, he returned later to retrieve his cellphone, which he then gave to his attorney (69:105-06).

> Number two. That the defendant believed or had reason to believe that the individual was under the age of 16 years.
>
> Number three. That the defendant used a computerized communication system to communicate with the individual with intent to have sexual contact with the individual.
>
> Number four. That the defendant did an act in addition to using a computerized communication system to carry out the intent to have sexual contact.
>
> Evidence has been received that the defendant communicated with a child under the age of 16 via a mobile or cellphone. You must determine whether the phone described in the evidence constitutes a computerized communication system.
>
> To aid in that determination, you are instructed that under Wisconsin law, a computer is defined as – computer is defines as computer, which 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. Computer system is defined as a set of related computer equipment, hardware or software.

(69:174-75). The jury then found McKellips guilty of the use of a computer to facilitate a child sex crime and obstruction of justice, but acquitted McKellips of sexual assault and exposure (69:257-58).

McKellips appealed, arguing that a cellphone that is not used to access the Internet cannot be a "computerized communication system," and that the statute criminalizing the use of a computer to facilitate a child sex crime is unconstitutionally vague. McKellips also argued that other acts evidence was improperly admitted at trial.

Following briefing and oral argument, the court of appeals reversed McKellips's conviction, concluding that the interest of justice required a new trial because the real controversy was not fully tried. *State v. McKellips*, 2015 WI App 311, ¶22, 361 Wis. 2d 773, 864 N.W. 2d 106; (Pet.-Ap.112). The court of appeals concluded that a cellphone, alone, cannot be a "computerized communication system." *Id.* ¶21; (Pet.-Ap. 111-12). Thus, the court reasoned that the circuit court's instruction to the jury that it "must determine whether the phone described in the evidence constitutes a computerized communication system" was in error and so clouded the real controversy that a new trial was needed. *Id.* ¶¶20-22; (Pet.-Ap. 111-12).

The State petitioned for review and this Court granted review on November 16, 2015.

SUMMARY OF ARGUMENT

The State's argument is multi-fold, but can be reduced to this: the court of appeals erroneously exercised its discretion in granting McKellips a new trial in the interest of justice. Here, the real controversy – whether McKellips used a computerized communication system to communicate with CH, a minor, with the intent to engage in sexual contact with her – was fully tried.

Wisconsin Stat. § 948.075(1r), which criminalizes the use of a computerized communication system to communicate with a child with the intent to have sex and for which McKellips was convicted, contains no requirement that the actor connect with the Internet in order to run afoul of the law. Moreover, the statute is not unconstitutionally vague; people of average intelligence understand that the use of a cellphone – with or without Internet capabilities – to communicate with a minor with the intent to lure the child into sexual activity is a crime.

Next, the circuit court's instruction to the jury in regard to Wis. Stat. § 948.075(1r), as a whole, accurately set out the law, although the circuit court misspoke when it instructed the jury to determine whether the cellphone itself was a "computerized communication system." But the circuit court's error was harmless beyond a reasonable doubt.

In addition, the court of appeals erroneously exercised its discretion when it granted a new trial in the interest of justice on a claim that can clearly be assessed for harmless error. Moreover, the court of appeals erroneously exercised its discretion in reversing McKellips's conviction without any explanation of how McKellips's case is so extraordinary that it warrants the extremely rare remedy of a new trial in the interest of justice.

ARGUMENT

I. The plain language of Wis. Stat. § 948.075(1r) states that any individual who uses a computerized communication system to try to have sex with a minor has violated the statute; the statute does not require that the individual also access the Internet.

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, 355 Wis. 2d 581, 852 N.W.2d 467.

If a statute's language is plain, the inquiry ends and its 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.

The "goal in statutory interpretation is to determine and give effect to the legislature's intent." *State v. Kittilstad*, 231 Wis. 2d 245, 256, 603 N.W. 2d 732 (1999).

B. Wis. Stat. § 948.075(1r) prohibits the use of a "computerized communication system" to facilitate a sex crime against a child; there is no requirement that an actor employ the Internet.

In briefing in the court of appeals, McKellips argued that a basic cellphone like the one that he used – as opposed to a Smartphone – simply cannot be used to violate Wis. Stat. § 948.075.[4] He argued that "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."[5] McKellips argued that his "mobile phone had no Internet capabilities" and thus, "as a matter of law," he could not have violated the statute. McKellips was incorrect on both the facts and the law.

First, Ryan Kaiser, the owner of a cellphone phone repair company, testified that McKellips's cellphone[6] was capable of accessing the Internet (68:5, 17). Kaiser testified that if McKellips were to download a picture that was sent to his cellphone, he would have had to access the Internet to do so (68:24-25). Thus, McKellips was wrong when he asserted that

---

[4] McKellips's Ct. of Appeals' Br. at 18-25.

[5] McKellips's Ct. of Appeals' Br. at 24-25.

[6] McKellips used several phones to contact CH over the course of the charging period (67:29, 42, 71-72). For purposes of the State's argument, it does not matter which was used to effect which communication; the State's argument remains the same for all phones, regardless of whether the phones were capable of accessing the Internet or not.

his cellphone lacked the ability to access the Internet.[7] McKellips conceded this point at oral argument in the court of appeals. *See McKellips*, ¶9 (Pet-Ap. 106).

Second, Wis. Stat. § 948.075(1r) states that "[w]hoever 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 … is guilty of a Class C felony." To be guilty of the intent element in (1r), the State must prove that the defendant committed an overt act in furtherance of the crime, in addition to the use of the computerized communication system. Wis. Stat. § 948.075(3). In other words, for a person to violate § 948.075(1r), the person must (1) use a computerized communication system (2) to communicate with a person that the defendant believes is not yet sixteen years old (3) with the purpose to have sexual contact and (4) must do something more than just communicate; the defendant must take an affirmative step to show his intent to follow through with the sexual contact. Nowhere in the statute is there a requirement that a person must access the "Internet" to be guilty of violating the statute. McKellips appears to create a new requirement out of whole cloth. If the Legislature wished to criminalize only those actors who used the Internet to communicate with children for the purposes of sexual activity, it certainly could have done so. Instead, the Legislature cast a wider net, presumably so that people like McKellips could not evade responsibility for their nefarious actions by hiding behind their phone's more primitive technology.

McKellips's assertion that his behavior is not criminal because there is no proof that he accessed the Internet is akin to

[7] McKellips's Ct. of Appeals Br. at 25.

arguing the following: The Legislature, concerned with adults grooming minors for sexual activity by using the private and secretive world of computers, chose to criminalize the use of a desktop computer to send an e-mail to a minor for the purpose of sexual activity, but if that same predator chose instead to use a disposable cellphone to send the same message via text message,[8] his activity would be beyond the scope of the statute. Similarly, a message sent via a private, self-contained network, like an intranet, that does not access an outside network would be legal under McKellips's theory, but a message that uses the Internet would not.[9] For example, if a school has an intranet that assigns email addresses to its faculty and students and a teacher used that intranet to send a sexually suggestive email message to a young student to lure her into sexual conduct, and then took the extra step required in Wis. Stat. § 948.075(3), the teacher's conduct would be permissible under McKellips's reading of the statute. This is plainly absurd.

In 2012, a New York court rejected an argument strikingly similar to the one McKellips raised below. *See New York v. Holmes*, 956 N.Y.S. 2d 365 (N.Y. App. Div. 2012). In *Holmes*, the defendant had argued that "sending sexually explicit text messages to a 16-year-old girl" was not a crime

---

[8] A text message is "a short message that is sent electronically to a cell phone or other device." *See* http://merriam-webster.com/dictionary (last visited Jan. 7, 2016).

[9] Jared D. Benson, Cyberprivacy on the Corporate Intranet: Does the Law Allow Private-Sector Employers to Read Their Employees E-mail?, 20 U. Haw. L. Rev. 165, 170 (1998) ("E-mail systems fall into two broad categories, internet systems and intranet systems. An internet e-mail system, such as American Online, utilizes public phone lines and provides e-mail services to its subscribers. An intranet e-mail system is a privately owned, self-contained e-mail system. Intranet e-mail systems provide direct connections between their users and do not use public telephone lines.") (footnotes omitted).

because "the act of sending telephone text messages does not involve the use of 'any computer communication system['"] as required by the statute under which the defendant was charged. *Id.* at 366. In rejecting the defendant's claim, the court first noted that penal statutes should not be given hyper-technical interpretations, but should instead be interpreted "according to the fair import of their terms to promote justice and effect the objects of the law." *Id.* (internal quotation and citation omitted). Next, the court noted that the Legislature defined "computer" and "computer data" broadly. *Id.* Third, while the court acknowledged that no appellate court in the state had addressed whether a telephone is considered a computer, a trial-level court had concluded that a telephone "is not merely a telephone …, but rather a telephone inextricably linked to a sophisticated computerized communication system[.]" *Id.* at 367 (quoting *New York v. Johnson*, 560 N.Y.S. 2d 238 (N.Y. Co. Crim. Ct. 1990). Given these three things – the need to construe statutes as justice demands, the broad definition of computer, and another court's fair finding that a telephone is a computer – as well as the court's approval of the criminalization of any communications intended to lure children into sexual activity, the court concluded that sending sexual explicit text messages to a child is prohibited by statute. *Id*.

The Legislature has defined a "computer" as "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." Wis. Stat. § 943.70(1)(am). At trial, Kaiser testified that McKellips's cellphone had logical, arithmetic and memory functions (68:11-16). Thus, the State proved that McKellips's cellphone is a computer. The State submits that a cellphone, whether employed to send text messages, make phone calls,

send e-mail, or access social medial, is per se accessing a computerized communication system.

While *Holmes* is not binding on this Court, its reasoning is instructive and persuasive. The State can think of no reason why the Legislature would (a) fail to put the word Internet into the statute if it sought to limit the prohibition of child-luring into Internet-only realms; and (b) choose to limit the statute in such a way. *How* the grooming messages are sent by the actor and to a child – whether through social media, text message, e-mail or voicemail – does not matter according to the statute. What matters is that a person used a computerized communication system to target a child for sex, which is expressly prohibited by Wis. Stat. § 948.075(1r).

II. Wisconsin Stat. § 948.075(1r) is not unconstitutionally vague; people of normal intelligence would understand that using a cellular phone to communicate with a child in order to have sex with her is illegal.

A. 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 question is 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 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.

B. 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 unconstitutionally vague.

In the court of appeals, McKellips argued that he "would have no reason to even consider that use of his basic mobile[10] phone could be construed as using a 'computerized communication system.'"[11] He argued that the statute does not sufficiently warn people that the use of their cellphone to contact a child to commit a sex crime is illegal.[12] McKellips's argument is without merit.

The court of appeals noted that the Legislature employed the term "computerized communication system" in three statutes, but declined to define it. *McKellips*, 361 Wis. 2d 773, ¶11. (Pet-Ap. 107). Reading the statutes – Wis. Stats. §§ 948.075, 947.0125, and 48.825 – together, the court of appeals concluded that the Legislature meant to exclude from the definition of "computerized communication system" the actual device used to access the system. *Id.* ¶16 (Pet-Ap. 109). In other words, the cellphone itself is not the computerized communication system. *Id.* (Pet-Ap. 109) The State agrees. The cellphone is the computer, which, when used as it is intended, then accesses the computerized communication system.

---

[10] The State reiterates that the parties agree that at least one of the cellphone that McKellips used in this case had access to the Internet. *See McKellips*, 361 Wis. 2d 773, ¶9 (Pet-Ap.106).

[11] McKellips's Ct. of Appeals Br. at 32.

[12] McKellips's Ct. of Appeals Br. at 26.

McKellips's initial premise that a person intent on following the law would not know that it is illegal to engage in communication with a child through a cellphone in an attempt to have sex with her is absurd. But McKellips's argument then appears to goes even further. He seems to imply that he understood that his actions would be criminal if he had contacted CH through social media, or even e-mail, to lure her into sexual contact. But because he used a "primitive" cellphone phone and used it for only text messages and voice calls,[13] he had no way to know that his offensive conduct was illegal. This argument is nonsense.

A person of average intelligence would understand that the use of a cellphone to send text messages to lure a child into sexual activity is against the law. A person intent on conforming his behavior to the law would not believe that grooming emails are illegal, but the same messages sent over text messages were perfectly fine. And this is what McKellips's constitutional challenge amounts to.

Below, McKellips argued 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.[14] This

---

[13] The State presented evidence from which a reasonable jury could find that McKellips accessed partially naked pictures of CH and that to access these pictures, McKellips used the Internet (67:89-90; 68:17-18, 24-25). Despite this, McKellips continued to assert below that the State presented no evidence that he used the Internet on the phone. *See McKellips*, 361 Wis. 2d 773, ¶9 (Pet-Ap. 106). Because the State's argument that a violation of Wis. Stat. § 948.075(1r) does not depend on whether a person accessed the Internet, this point is not germane to the State's argument.

[14] McKellips' Ct. of Appeals Br. at 31, 33-34.

argument is meritless. The State's view is simple: a defendant who uses a computer to access a communication system in order to facilitate a sex crime against a child is guilty of Wis. Stat. § 948.075(1r); any one of reasonable intelligence would know that this is true. McKellips's own actions suggest that he understood that he had acted illegally: he bought a secret cellphone for a minor and then hid his own phone from police. His present suggestion that the statute is just too vague for anyone to understand that what he was doing was illegal is disingenuous.

III. The circuit court misspoke when it told the jury that it must determine whether the cellphone "described in the evidence constitutes a computerized communication system," but as a whole the instructions were accurate.

With regard to whether McKellips violated Wis. Stat. § 948. 075(1r), the circuit court instructed the jury as follows,

> Before you may find the defendant guilty of this offense, the state must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.
>
> Number one. That the defendant used a computerized communication system to communicate with an individual.
>
> Number two. That the defendant believed or had reason to believe that the individual was under the age of 16 years.
>
> Number three. That the defendant used a computerized communication system to communicate with the individual with intent to have sexual contact with the individual.

> Number four. That the defendant did an act in addition to using a computerized communication system to carry out the intent to have sexual contact.
>
> Evidence has been received that the defendant communicated with a child under the age of 16 via a mobile or cellphone. You must determine whether the phone described in the evidence constitutes a computerized communication system.
>
> To aid in that determination, you are instructed that under Wisconsin law, a computer is defined as – computer is defines as computer, which 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. Computer system is defined as a set of related computer equipment, hardware or software.

(69:174-75).

As stated in the State's Argument Section I, a cellphone in and of itself is not a "computerized communication system." It is, instead, a computer that it used to access such a system. Thus, the circuit court misspoke when it also instructed the jury that it must "determine whether the phone described in the evidence *constitutes* a computerized communication system" (69:175) (emphasis added). That said, the circuit court correctly stated all four elements of the offense that the jury was required to find beyond a reasonable doubt before it was permitted to find McKellips guilty of using a computer to facilitate a child sex crime:

1. He used a computerized communication system;
2. He used it to communicate with a child he believed had not yet turned sixteen years old;
3. He did so with the intent to have sex with the child;

4. And he participated in an overt act in addition to the communication to further the sex act.

(69:174-75).

In the order granting the State's petition for review, this Court posed the question, "Is asking whether the cellular phone constituted a computerized communication system equivalent to asking whether the cellular phone constituted a component of a computerized communication system?" The State submits that asking whether a cellphone is a computerized communication system is not precisely equivalent to asking whether a cellphone was part of a computerized communications, but that as a practical matter the difference between these two questions in a case like this may be of no import. Although a cellphone is not a computerized communication system within the meaning of the statute, but is instead the computer that is used to access that system, it is difficult to imagine an instance in which a cellphone would be used as it is intended – either to make a phone call, send a text message or a picture, or access the Internet where it would *not* be employed as part of a greater computerized communication system. In that sense, then, while they are two different things – one the device, the other the system the device is used to access – if a defendant uses a cellphone to communicate with a child he believes had not reached the age of sixteen, then the first two elements of Wis. Stat. § 948.075(1r) would necessarily be satisfied. In other words, even though the circuit court told the jury that it must determine whether the phone used *is* a computerized communication system, the jury's finding that McKellips used the phone to communicate with CH unavoidably meant that the phone was used to access a computerized communication system. Stated another way, if the jury found McKellips used the phone – and the evidence was overwhelming that he did so,

including his own admission that he did – then he also used the computerized communication system.

In addition, courts do not evaluate jury instructions in isolation. *State v. Pettit*, 171 Wis. 2d 627, 637, 492 N.W. 2d 633 (Ct. App. 1992). As a whole, the jury instruction, which set forth all of the elements of the offense, correctly stated the law.

IV. When a defendant has forfeited a challenge to a jury instruction, at trial and on appeal, and any error in that jury instruction was harmless, it is an erroneous exercise of discretion to grant a new trial in the interest of justice.

A. The circuit court's error in misstating a portion of the jury instruction was harmless.

1. Relevant law on harmless error

"In order for an error to be harmless, the State, as the party benefitting from the error, must prove that it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *State v. Nelson*, 2014 WI 70, ¶44, 355 Wis. 2d 722, 849 N.W. 2d 317 (quoting *Harvey*, 254 Wis. 2d 442, ¶46). In other words, this Court must be sure "'that the jury *would* have arrived at the same verdict had the error not occurred.'" *Id*. (emphasis in original) (quoting *State v. Martin*, 2012 WI 96, ¶45, 343 Wis. 2d 278, 816 N.W. 2d 270). Factors to consider in assessing the error include: the frequency of the error, the importance of any erroneously admitted evidence, the presence/absence of corroborating or contradicting evidence, nature of the defense, nature of the State's case, and the strength of the State's case. *Martin*, 343 Wis. 2d 278, ¶46.

2. Here, any error in the jury instruction was harmless beyond a reasonable doubt.

For the first time at oral argument, the court of appeals, *sua sponte*, challenged one sentence in the circuit court's instructions to the jury on the charge of the use of a computer to facilitate a child sex crime. *McKellips*, 361 Wis. 2d 773, ¶¶20-22 (Pet-Ap. 111-12). The court of appeals objected to the circuit court's instruction that the jury "must determine whether the phone described in the evidence constitutes a computerized communication system." *Id.* ¶20; (Pet-Ap. 111). The court of appeals held that "a cell phone or other device, itself, can never constitute a computerized communication system." *Id.* ¶20 (Pet-Ap. 111). The court concluded that the circuit court "should have asked the jury whether McKellips's various alleged uses of the cellphone constituted communication via a computerized communication system." *Id.* ¶21 (Pet-Ap. 111-12). Although the court of appeals acknowledged that the circuit court read the jury the pattern instruction on Wis. Stat. § 948.075, which set forth the four elements that the State is required to prove, it declined to address whether the jury instruction as a whole correctly stated the law, or whether the circuit court's misstatement was harmless. *Id.* ¶¶5, 20-22 (Pet-Ap. 103-04,111-12). Although, as stated above, the State believes that the jury instructions on the whole accurately stated the law, if there were any error in the instructions, the error was harmless beyond a reasonable doubt.

Here, the circuit court properly instructed the jury on all four elements of the crime of the use of a computer to facilitate a child sex crime (69:174-75). The court also properly defined "computer" for the jury (69:175). The concern that the court of appeals had with the circuit court's instruction was the trial court's subsequent statement to the jury that it "must determine whether the phone described in the evidence constitutes a computerized communication system" (69:175).

But this statement alone – given after the court instructed the jury on the elements of the offense – did not contaminate the entire instruction and certainly not the entire case.

The error that the court of appeals noted was made one time in an otherwise properly-stated jury instruction; the error was not even noted by McKellips; the error had no effect on the evidence before the jury; and the error had no actual effect on the substance of the case. *See Martin*, 343 Wis. 2d 278, ¶46 (listing the factors that should be considered when assessing harmless error). And perhaps most importantly, the evidence that McKellips used his cellphone to access a computerized communication system to contact CH to lure her into sexual behavior was overwhelming. It is inconceivable to suggest that the jury would have arrived at any result other than guilty had the circuit court omitted the sentence from its instruction. *See Nelson*, 355 Wis. 2d 722, ¶44.

B. The court of appeals erroneously exercised its discretion in reversing McKellips's conviction based on a harmless jury instruction.

1. Relevant law on appellate courts' discretionary reversal power

Appellate courts possess broad authority to reverse criminal convictions based on unobjected-to errors that occurred in the trial courts. *See* Wis. Stats. §§ 751.06, 752.35; *State v. Vollmer*, 156 Wis. 2d 1, 19, 456 N.W. 2d 797 (1990). An appellate court may reverse a judgment without finding that there is a substantial probability of a different result upon retrial if the court finds that the real controversy was not fully tried. *Vollmer*, 156 Wis. 2d at 19. That said, such authority should be used sparingly and in only exceptional circumstances. *See State v. Avery*, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W. 2d 60.

Sometimes a jury instruction is so wrong, and its confusion so great, that it may be said that the instruction caused the real controversy not to be tried. *See Vollmer*, 156 Wis. 2d at 20, 22. But in most cases, an erroneous jury instruction should be evaluated for harmless error. *See State v. Harvey*, 2002 WI 93, ¶¶35-46, 254 Wis. 2d 442, 647 N.W. 2d 189.

2. Here, where the unobjected-to jury instruction was harmless, the court of appeals erroneously exercised its discretion in granting a new trial in the interest of justice.

It is not appropriate to grant a new trial in the interest of justice on the ground that the real controversy was not fully tried based on an erroneous jury instruction when that instruction was harmless. Here, the court of appeals erred as a matter of law in granting a new trial in the interest of justice because the unpreserved instructional error was harmless beyond a reasonable doubt.

The State understands that there are exceptional times when a jury instruction can so confuse the issues that it may be said that the real controversy was not fully tried. *See Vollmer*, 156 Wis. 2d at 20, 22. But this happens in only the most rare cases. In most instances in which the circuit court erroneously instructed the jury, appellate courts employ the harmless error test. *See State v. Gordon*, 2003 WI 69, ¶5, 262 Wis. 2d 380, 663 N.W. 2d 765; *Harvey*, 254 Wis. 2d 442, ¶¶35-47. This is because when an error is capable of quantitative assessment, it should be evaluated for harmless error. *See Nelson*, 355 Wis. 2d 722, ¶¶30-32.

"In *Neder*, the Supreme Court held that a jury instruction that improperly omitted an element of the offense (there, because the trial judge decided it, contrary to the defendant's

due process and jury trial rights) is subject to harmless error analysis." *Harvey*, 254 Wis. 2d 442, ¶36 (citing *Neder v. United States*, 527 U.S. 1. 15 (1999)). The *Neder* Court held that all constitutional errors – even an error as serious as omitting an element of the offense from the jury instructions – are subject to harmless error analysis. *Id.* ¶37 (citing *Neder*, 527 U.S. at 8). "Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, 527 U.S. at 8 (emphasis in original).

This Court approved of *Neder*'s rule that automatic reversal is not necessary when a jury instruction omits an element of the offense. *See Gordon*, 262 Wis. 2d 380, ¶5; *Harvey*, 254 Wis. 2d 442, ¶¶6, 44-47. In *Harvey*, over Harvey's objection, the circuit court took judicial notice of an element of the crime. 254 Wis. 2d 442, ¶¶35. This Court found that the judicial notice was constitutional error, but that the error was harmless. *Id.* ¶¶35, 47. If harmless error analysis is appropriate when the trial court has omitted an element of the offense from the instructions, or has taken judicial notice of an element of the offense, then surely a single direction of the type here – one that was both harmless and one that was of no actual import to the case – cannot have so obfuscated the real controversy at issue such that the case was not fully tried.

Further, the court of appeals based its reversal on its conclusion that whether McKellips used a computerized communication system "was the primary issue at trial." *Id.* ¶22 (Pet-Ap. 112). But this conclusion misreads the record and examines the charge and the jury instructions in a vacuum. While McKellips attempted to show that a non-smart phone cannot be a computer within the meaning of the statute, his larger and much more significant focus was on showing that his communication with CH was not nefarious. He attempted

to demonstrate that the excessive amount of contact between the two of them was not because he wanted to have sex with her, but because he was helping her with basketball and her alleged depression (69:85-87, 117-23). To say that the primary issue in the case was whether McKellips used a computer or a computerized communication system is simply wrong. The primary issue in the case was whether McKellips was communicating with CH in order to have sex with her. The circuit court's instruction on the cellphone as a "computerized communication system" did not confuse this main issue; this issue was fully litigated.

The evidence that McKellips used his cellphone to communicate with CH in order to engage in sexual contact with her was overwhelming (67:49-92; 68:51-85). The evidence that McKellips's cellphone was a computer was similarly overwhelming (68:11-16). In addition, the State presented evidence that when a person sends a text message using a cellphone, the phone sends the message through a cellular network to server (68:19). What else would using a computer to send a message through a cellular network to another computer be, but the use of a computerized communication system? Despite all of this, the court of appeals found that the circuit court's single statement – after it properly recited the four elements of the offense – that the jury must determine whether the phone was a computerized communication system essentially so obfuscated the issue that the real controversy was not tried.[15] *McKellips*, 361 Wis. 2d 773, ¶¶21-22 (Pet-Ap. 111-12). In addition, the court of appeals ignored that it would have been impossible to use the cellphone in the manner in which McKellips did without also using the computerized

[15] It is not clear from the court of appeals' decision if it would have been satisfied with the circuit court's instructions if the court had omitted the erroneous sentence and instead read only the pattern instruction.

communication system. Thus, because the evidence that McKellips used the cellphone to communicate with CH was overwhelming, and because McKellips admitted to the overwhelming communication, the circuit court's single sentence misstating that the jury must determine whether the phone was also the system was harmless.

The court of appeals' conclusion that the circuit court's erroneous instruction caused the real controversy not to be tried ignores well-established law that "[j]ury instructions are not to be judged in artificial isolation, but must be viewed in the context of the overall charge." *State v. Pettit*, 171 Wis. 2d 627, 637, 492 N.W. 2d 633 (Ct. App. 1992). Here, before the circuit court gave the erroneous instruction, the court correctly instructed the jury on all of the elements of the crime. The jury was properly instructed that it must find that (1) McKellips used a computerized communication system; (2) he had reason to know CH was under sixteen years old; (3) he used the system to communicate with CH with the intent to have sex; and (4) he committed an additional act with the intent to have sex (69:174-75). The court of appeals' conclusion that the real controversy was not tried ignores the rule that it must not examine an erroneous instruction in a vacuum.

The real issue was whether McKellips was using the computerized communication system *with the intent to have sexual contact with* CH. The real issue was not what kind of device he used and how that device interacted with its server or the Internet or other cellphones. Here, the real controversy was fully tried.

V. The court of appeals erroneously exercised its discretion in granting a new trial in the interest of justice without first analyzing whether McKellips' case was exceptional enough to warrant the formidable remedy.

A. Relevant law on the necessity to exercise the formidable reversal power in only exceptional cases

Although the court of appeals and this Court both have the authority to grant a new trial in the interest of justice on the ground that an unpreserved trial error prevented the real controversy from being fully tried, that power is to be used judiciously and infrequently; it is a formidable power that should be exercised only in exceptional cases. *See Vollmer*, 156 Wis. 2d at 11; *See Avery*, 345 Wis. 2d 407, ¶38.

In *Avery*, this Court held that the court of appeals erroneously exercised its discretion when it granted a new trial in the interest of justice on the ground that the real controversy was not fully tried without undertaking any analysis to determine whether the case warranted the exceptional remedy. 345 Wis. 2d 407, ¶¶3, 55. In granting the remedy, the court of appeals need not first use the magic word "exceptional," but the court of appeals "does have an obligation to analyze why a case is so exceptional to warrant a new trial in the interest of justice." *Id.* ¶55 n.19.

B. The record lacks any analysis of how McKellips's case is exceptional.

Here, not only did the court of appeals not deem McKellips's case "exceptional" or rare, the court failed to point to any reason why the case was among the extraordinary variety of cases that warrant reversal. In fact, the court of appeals failed to acknowledge that such an analysis was

required of it. The mandate that the discretionary reversal power is to be exercised infrequently, judiciously and only in exceptional cases is a limitation on the court of appeals' authority to grant a new trial in the interest of justice.

In *Hicks*, this Court granted a new trial in the interest of justice, finding that the real controversy was not fully tried because the jury "did not have an opportunity to hear and evaluate evidence of DNA testing which excluded Hicks as the source of one of the four pubic hairs found at the scene" of the crime. *State v. Hicks*, 202 Wis. 2d 150, 153, 163, 549 N.W. 2d 435 (1996). This Court noted that it is reluctant to grant a new trial in the interest of justice and "does so only in exceptional cases." *Id.* at 161. This Court pointed out that granting a new trial in a sexual assault case places great "anguish and anxiety" on the victim and that, "[i]n a perfect world where truth could be ascertained and justice obtained without the trauma of a victim's testimony, a new trial would be unnecessary." *Id.* at 171. But because we do not live in a perfect world, we instead rely on "the jury to deliver justice" and that means that the jury must be allowed to hear "critical, relevant, and material evidence, or at the very least, not be presented with evidence on a critical issue that is later determined to be inconsistent with the facts." *Id.* Because "[t]he major issue in th[e] case was that of identification" and the State's case relied heavily upon evidence that hair found at the crime scene could have come from Hicks – evidence that was partially refuted later – this Court concluded that it could not "say with any degree of certainty that the hair evidence used by the State during trial played little or no part in the jury's verdict." *Id.* at 164-72. Consequently, a new trial was required so that the jury could evaluate all of the relevant evidence. *Id.* at 171.

In *Avery*, this Court addressed the court of appeals' decision awarding Avery a new trial based on its conclusion that the real controversy was not fully tried because the jury

had not been able to consider photogrammetry evidence, which Avery had produced after his conviction, that allegedly showed the robber was shorter than Avery.[16] 345 Wis. 2d 407, ¶¶12, 19, 21. This Court noted that the discretionary power to reverse a criminal conviction in the interest of justice is to be "exercised only 'in exceptional cases'" and "'infrequently and judiciously.'" *Id.* ¶38 (quoting *State v. Burns*, 2011 WI 22, ¶24, 332 Wis. 2d 730, 798 N.W. 2d 166 and *State v. Ray*, 166 Wis. 2d 855, 874, 481 N.W. 2d 288 (Ct. App. 1992)). This Court concluded that the court of appeals erroneously exercised its discretion in granting Avery a new trial in the interest of justice without analyzing whether his case was an exceptional case warranting the extraordinary remedy. *Id.* ¶59. Moreover, this Court contrasted Avery's case with Hicks's. *Id.* ¶¶41-48, 55-58. Unlike *Hicks*, the evidence that Avery argued should have been presented – the photogrammetry evidence – did not discredit the evidence that the State had presented at trial, nor did it show that the State's evidence was somehow compromised. *Id.* ¶¶41, 56, 58. As such, this Court concluded that the real controversy – the identity of the robber – was fully tried. *Id.* ¶¶39, 58.

In both *Hicks* and *Avery*, this Court made it clear that before an appellate court may grant a new trial in the interest of justice on the ground that the real controversy was not fully tried, the court must employ at least some analysis as to how the case warrants the exceptional remedy. Here, the court of appeals wholly ignored this requirement. *McKellips*, 361 Wis. 2d 773, ¶22 (Pet.-Ap. 112). Before granting Hicks's new trial in the interest of justice, this Court went to great lengths to explain why Hicks's case was so special. *Hicks*, 202 Wis. 2d at 163-72. This Court stated that it was not granting the new trial

[16] The court of appeals also based its decision reversing the conviction on newly discovered evidence. *See Avery*, 345 Wis. 2d 407, ¶19.

simply because Hicks had produced postconviction DNA evidence, but that the new DNA evidence combined with the manner in which the State had relied heavily on the physical evidence at the new trial necessitated the new trial. *Id.* at 164. "The combination of these two factors leads us to the conclusion that the real controversy was not fully tried." *Id.*

In contrast, the court of appeals here offered very little analysis as to how one sentence in the circuit court's otherwise proper instruction – and one sentence in an otherwise capably presented case – led to the real controversy not having been fully tried. The court failed to offer any explanation at all for how the case is exceptional. Without any analysis of the exceptional nature of the case, this Court should conclude that the court of appeals erroneously exercised its discretion in reversing McKellips's conviction. *See Avery*, 345 Wis. 2d 407, ¶59.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the decision of the court of appeals.

Dated this 6th day of January, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

KATHERINE D. LLOYD
Assistant Attorney General
State Bar #1041801

Attorneys for Plaintiff-
Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7323
(608) 266-9594 (Fax)
lloydkd@doj.state.wi.us

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 9,112 words.

_____

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 6th day of January, 2016.

_____

Katherine D. Lloyd
Assistant Attorney General