STATE OF WISCONSIN, SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

-vs-

Case No.:
2014AP000827-CR

RORY A. MCKELLIPS,

Defendant-Appellant.

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

MARATHON COUNTY CASE NO.: 11 CF 645

RESPONSE BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE CASE

"I love you, baby doll."

"Morning. Beautiful day yesterday."

The quotes above are the only text messages from Defendant, Rory McKellips (hereinafter referred to as "McKellips") to his accuser, CJH, which were produced and introduced into evidence during a five (5) –day jury trial. R. 67 at 77-78. While McKellips was found not guilty of both exposing his genitals to CJH (Wis. Stat. § 948.10(1)) and repeated sexual assault of CJH (Wis. Stat. § 948.025(1)), he was convicted of use of a computerized communications system to facilitate a sex crime (Wis. Stat. § 948.075(1r)) and obstructing an officer (Wis. Stat. § 946.41(1)). He was sentenced to ten (10) years in prison, plus an additional five (5) years of extended supervision. R. 80 at 92-93. The conviction on the former charge was appealed, and the Court of Appeals granted a reversal and new trial, a decision which the State has successfully petitioned this Court to review.

McKellips has been coaching high school girls' basketball for twenty-seven (27) years. He coached for his hometown school in Mosinee, then at Wisconsin Valley Lutheran for one (1) season, before accepting the vacant coaching position at Athens High School in 2010. R. 69 at 69. His coaching moves were not based on team performance, but were caused by work role and shift changes at his principal employer, Mosinee Papers (formerly Wausau Paper Corporation). R. 69 at 69-71.

It was at Athens High School where McKellips came into contact with CJH (born April 18, 1996). CJH was a talented basketball player; she started as a freshman for the varsity team McKellips coached during the 2010-2011 season and was named one of the team captains. Following the basketball season, CJH continued to play organized basketball for her regional AAU team.[1] R. 67 at 25. She also played for the Athens High School baseball team. R. 67 at 25.

McKellips and CJH remained in communication throughout the basketball off season. CJH would call or send text messages to McKellips about her basketball and her practice shooting performance; CJH frequently expressed worry about falling behind her competition. R. 69 at 44, 117-118, 137. This also meant McKellips could stay in communication with his team in Athens via CJH while living and working in Mosinee. At times, the conversations were more personal in nature. CJH is a child of divorce, and her parents (both remarried) tended to argue. R. 69 at 43, 85. CJH saw time spent talking with Rory McKellips and his wife, Connie McKellips, as an escape from her home life. R. 69 at 43-44.

When an AAU trip to Minnesota removed CJH from her regional cellular network's coverage area in June 2011, the large phone bill from relaying tournament information to McKellips aggravated CJH's mother. R. 67 at 31-32. During a subsequent conversation, CJH asked McKellips to buy her a phone, so that CJH could remain in communication with McKellips during a family vacation

[1] Amateur Athletic Union, a regional athletic traveling team run independent of the high school program. The AAU team was not coached by McKellips. R. 67 at 27.

out West with her father. R. 69 at 119. McKellips purchased a pre-paid cellular phone for CJH's use. R. 69 at 119. CJH repaid McKellips for the phone.[2]

In June 2011, during an AAU basketball tournament, CJH tore an ACL in one of her knees. R. 67 at 43. With a recovery time of six (6) to nine (9) months, the injury would seriously hinder her ability to play in the 2011-2012 basketball season. R. 67 at 47-48. Following return travel to central Wisconsin, and a doctor's visit to confirm the injury, CJH stayed with the McKellips while waiting for her parents to return from an out-of-town wedding. R. 69 at 22-25.

That same day in June of 2011 is the first of three (3) or four (4) occasions where CJH alleged to have engaged in sexual contact with McKellips. McKellips denies having engaged in any sexual contact with CJH. R. 69 at 106-107. McKellips' wife Connie was present in the living room with McKellips and CJH throughout the entire hour when the contact was alleged to have occurred, before the McKellips and CJH went out to see one of the McKellips' grandchildren's baseball games in New London. R. 69 at 40-41, 89-90. The living room has large windows, meaning that any of the alleged sexual contact would have been broadcast to McKellips' neighborhood. R. 50 at Ex. 57-59; R. 69 at 30-32. Due to a variety of inconsistencies in the testimony, including the presence of other people in the home who dispute the occurrences, the Jury ultimately acquitted

[2] This testimony was not introduced at trial, but Defendant's counsel made an offer of proof of the repayment during the argument of an objection as demonstrative of Connie McKellips' prior knowledge of the cell phone. R. 69 at 57-58.

McKellips on the sexual contact and exposure of genitals charges. *See, e.g.*, R. 69 at 27-28. Those charges are not part of the present appeal.

Also not part of the appeal is the obstruction of justice charge, as McKellips gave a false statement to the investigator to protect a cellular phone, which he believed had an exonerating text from his accuser, received after CJH's parents had discovered the cellular phone originally purchased by McKellips. R. 69 at 149, 152-153. While the text was no longer on McKellips' phone, the contents of the message were recovered by police and introduced at trial. R. 50 at Ex. 16. The exonerating text was one of the five (5) exhibits requested by the jury during their deliberations, along with the photos of the McKellips living room, and the text message conversation which yielded the only three (3) sentences worth of text messages from McKellips introduced during the trial. R. 69 at 253 – 256. The exonerating text message was the only piece of evidence withheld from the jury during its deliberations, due to the State's failure to redact the exhibit to show only CJH's messages to McKellips. R. 69 at 256.

Before the trial, McKellips, through counsel, moved to dismiss the only charge which is the subject of this appeal: the use of a computerized communication system to facilitate a sex crime. R. 29-30. During the final pretrial, the circuit court denied the motion, incorporating the definition of "computer" from Wis. Stat. § 943.70(1)(am) into his analysis. R. 49 at 16. McKellips filed a petition for interlocutory appeal on the basis of the circuit court's interpretation of Wis. Stat. § 948.075(1r), but the appeal was rejected at that time.

The same definition was used by the Court to supplement the form jury instruction to "aid" the jury in making the determination. R. 69 at 175. Both the State and its expert witness incorporated the language of the definition into their arguments and testimony, respectively. R. 69 at 212; R. 68 at 11-19.

The Court of Appeals reviewed the record and briefs, and conducted oral arguments before issuing their decision. Oral arguments clarified some of the issues: McKellips' cellular phone was capable of accessing the Internet, but had not been used in that capacity to communicate with his accuser. State v. McKellips, 2015 WI App. 31, ¶ 9, 361 Wis. 2d 773, 864 N.W.2d 106. Conversely, the State acknowledged it had incorrectly focused on McKellips' cellular phone being a "computer," but argued that a phone network is a "computerized communication system," even if that was not the question posed to the jury in the circuit court. Id. at ¶ 10. Based on the record, the Court of Appeals determined the genuine issue – whether McKellips' use of his cellular phone constituted use of a "computerized communication system" for purposes of Wis. Stat. § 948.075(1r) – was not tried, and therefore reversed the judgment and remanded for a new trial. Id. at ¶22. The State successfully petitioned the Court for review of the Court of Appeals decision.

QUESTIONS PRESENTED

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

1.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?

1.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. Was the jury instruction regarding the charge of violating Wis. Stat. § 948.075 an accurate statement of the law? 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?

3. 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 use of a mobile phone that has no independent Internet capabilities would constitute use of a computerized communication system in violation of the law?

4. As a matter of law, can a new trial in the interest of justice be granted on the ground the real controversy was not fully tried based on a waived challenge to

a jury instruction where the erroneous instruction was harmless error? If the jury instruction in this case was erroneous, was the error harmless?

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?

BRIEF ANSWERS

1. "Computerized communication system" should mean a device or series of devices which utilize the Internet –directly or indirectly – to send data from one user to another user. A cellular phone may be a component of the computerized communication system when an Internet connection is utilized, but not when the phone only utilizes the features and functions of a telephone network.

1.a. Use of a cellular phone as a telephone – including text messaging – is not the use of a computerized communication system.

1.b. A cellular phone must access the Internet, not just the cellular phone's data network, to fall within the bounds of a computerized communication system.

2. The form jury instruction is an accurate statement of the law, but the additional language meant to supplement the instruction creates a misleading interpretation of the standards for what constitutes a computerized communication system under Wisconsin law. The discrepancy between the phone-as-system versus the phone-as-component-of-a-system are symptoms of the lack of a defining standard for courts and juries to consistently apply to the question.

3. The lack of a defined standard for what constitutes a computerized communication system renders the statute unconstitutionally vague.

4. On direct appeal, the Court of Appeals' reversal authority does not typically require that a jury may reach a different outcome during a retrial, contrary to the attempt to impose a harmless error standard in this case. That being said, the evidence introduced at trial calls the verdict into serious question, such that the error should not be deemed harmless.

5. Again, a reversal on direct appeal in the interests of justice is typically not required to demonstrate a showing that the jury could reach a different outcome at retrial. That being said, the Court of Appeals did conduct the "exceptional case" analysis without calling attention to their having done so, rendering the question moot.

STANDARDS OF REVIEW

The Court's review of the Court of Appeals' discretionary power to reverse a conviction in the interest of justice is reviewed for an erroneous exercise of that discretion. State v. Avery, 2013 WI 13, ¶ 23, 345 Wis. 2d 407, 826 N.W.2d 60.

Interpretation of the language of a statute and its application to a particular set of facts is a question of law which the Court reviews de novo. State v. Soto, 2012 WI 93, ¶ 14, 343 Wis. 2d 43, 817 N.W.2d 848.

Constitutionality of a Wisconsin State Statute is a question of law which the Court reviews de novo. State v. Pittman, 174 Wis. 2d 255, 496 N.W.2d 255 (1993).

ARGUMENT

I. MCKELLIPS' PHONE CALLS AND TEXT MESSAGES WITH HIS ACCUSER DO NOT CONSTITUTE USE OF A "COMPUTERIZED COMMUNICATION SYSTEM" AS THE TERM SHOULD BE PROPERLY UNDERSTOOD.

The Court has established a framework for interpretation of words or phrases which may render a statute ambiguous. State ex. rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, ¶ 44-52, 271 Wis. 2d 633, 681 N.W.2d 110. The analysis begins with judicial deference to the policy choices enacted into law by the legislature, with the assumption that the legislature's intent is expressed in the language of the statute. Id. at ¶ 44.

> Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.

Id. at ¶ 45. Ambiguity exists when a statute's language "*reasonably* gives rise to different meanings." Id. at ¶ 47 (emphasis in original). When a statute is ambiguous, the court may turn to extrinsic evidence to determine the "scope, history, context, and purpose of the statute." There is an additional factor for consideration in cases like this one, interpreting criminal statutes:

> [W]hen there is doubt as to the meaning of a criminal statute, courts should apply the rule of lenity and interpret the statute in favor of the accused.

State v. Jackson, 2004 WI 29, ¶ 12, 270 Wis. 2d. 113, 676 N.W.2d 872.

The phrase "computerized communications system" from Wis. Stat. § 948.075(1r) is not defined anywhere in the Wisconsin statutes. As noted by the Court of Appeals, the phrase exists in multiple, separate places in the statutes; none of which provide a precise intended definition. State v. McKellips, 2015 WI App. 31, ¶ 10-11, 361 Wis. 2d 773, 864 N.W.2d 106. McKellips and the State are in disagreement over whether the communication between McKellips and his accuser – conducted via phone calls and text messages – constitutes use of a "computerized communications system." Defining criminal conduct is entirely the role of the legislature, and although this phrase is clearly intended to have a specialized meaning beyond the dictionary definitions of the three (3) words, the legislature has abdicated its responsibility to define the term. State v. Baldwin, 101 Wis. 2d 441, 447, 304 N.W.2d 742 (1981). The term cannot be left to be unilaterally defined by prosecutors.

A. Wis. Stat. § 948.075(1r) is Intended to Affect Internet Communications, not Telephonic Communications.

Looking to the related statutes in which the phrase "computerized communication system" is used points towards an important distinction. Wis. Stat. § 947.0125 was drafted by the legislature to largely mirror the prohibitions of the "unlawful use of telephone" statute. *C.f.*, Wis. Stat. § 947.012, 947.0125. Instead of treating telephones and "computerized communication systems" in a

unified manner, amending Wis. Stat. § 947.012 to incorporate computerized communications in with telephonic communication, the legislature drafted a new, similar-yet-distinct statute for computerized communication systems. As we must view the legislature's policy choices as intentional, the separation between "computerized communication systems" from use of a telephone evidences an intended schism between telephones and "computerized communications systems." Based on the statutory construction employed by the legislature, the telephone system must be held as separate and distinct from its computerized counterpart; use of the functions of a telephone cannot – by itself – constitute use of a "computerized communication system."

The Court of Appeals noted the need to interpret the phrase "computerized communication system" in conjunction with the term's usage in other, related statutes. McKellips, 2015 WI App. 31 at ¶ 10, 12. While the State conceded during oral argument the legislature intended "computerized communication system" to have the same meaning in related statutes, the State's brief argues plain meaning without analyzing context for the surrounding statutes. To the extent there is a genuine ambiguity between the two approaches, we resolve the ambiguity by looking at the extrinsic evidence for context, purpose, history and scope. Extrinsic evidence may also be useful to confirm a plain-meaning interpretation, to ensure the plain meaning would reconcile with the legislature's apparent intention. Kalal, 2004 WI 58 at ¶ 52.

Wis. Stat. § 948.075(1r) was created out of what was primarily an appropriations bill, albeit one which also dealt with "diverse other matters." 2001 WI Act 109, §§ 904M - §904N. Unlike some other acts, there are no notes in the language of the act which would guide our interpretation of the statutory language found therein; there is also no explanatory memo from the Legislative Reference Bureau or Legislative Council as to guide our understanding of the legislative intent. Fortunately, Wisconsin case law provides us with essential insight as to the legislature's intent, as the court system was itself forced to address the same issue in the same timeframe.[3]

There was an uncertainty in the law as to whether a defendant could be charged with attempted sexual assault on a minor child (or child enticement) when the "child" was an undercover law enforcement agent posing as a person under the age of sixteen (16) on the Internet. The question was answered by this Court in June 2002, while the legislature was drafting 2001 WI Act 109. State v. Robins, 2002 WI 65, ¶ 34, 253 Wis. 2d 298, 646 N.W.2d 287. The Robins decision would have come out after the passage of the legislation, but for the State and the defendant joining in agreement to bypass the Court of Appeals in having the issue decided by this Court. Id. at ¶ 19. The stated rationale for bypassing appellate review noted the "substantial number of pending child enticement prosecutions

[3] 2001 Wis. Act 109 was introduced during a special session of the Wisconsin Legislature in February 2002, and was amended and debated into July of that year. The act was signed into law on July 26, 2002. *See*, http://docs.legis.wisconsin.gov/2001/proposals/jr2/ab1.

involving internet 'sting' operations in which government agents pose online as children." Id.; *see also*, State v. Koenck, 2001 WI App. 93, ¶ 5-6, 242 Wis. 2d 693, 626 N.W.2d 359 (events occurred in July 2000; case decided in March 2001); State v. Grimm, 2002 WI App. 242, ¶ 2-5, 258 Wis. 2d 166, 653 N.W.2d 284 (events occurred in October 2000; case decided in September 2002); State v. Brienzo, 2003 WI App. 203, ¶ 4-7, 267 Wis. 2d 349, 671 N.W.2d 700 (events occurred in January 2001; case decided in October 2002).

It would be the height of absurdity to suggest the legislature drafted Wis. Stat. § 948.075(1r) addressing the attempted sexual assault of minors via the Internet concurrently-yet-with-different-intent than that of the court system in attempting to address the same problem with the existing laws. The problem which the legislature sought to address is the exploitation of Internet anonymity to target children. The remedy already being utilized by law enforcement was to turn the same anonymity against the criminal, in a "To Catch a Predator"[4] –style sting operation. When the legislature used the words "computerized communication system" in the language of the statute, the confluence of the legislative and legal history makes clear the legislature was addressing use of the Internet. There is nothing in the text or the surrounding circumstances which supports the State's assertion that the legislature "cast a wider net" than the Internet sting operations which created the legal controversy.

[4] The "Dateline NBC" investigative television series did not inform the creation of 2001 WI Act 109, as the series first aired in 2004.

B. Interpretation of Wis. Stat. § 948.075(1r) Must Account for the Intersection of Contemporary Smartphones and the Internet.

The Wisconsin Legislature has, as pointed out above, chosen to create a distinction between telephone communications and "computerized communication systems" accessing the Internet. While cellular phones are a relatively new technology in the history of mankind, both the cell phone and SMS[5] messaging existed and coming into increasing prominence in early 2002 when 2001 WI Act 109 was debated, passed, and eventually signed into law without a definition for "computerized communication systems." *See*, Supp. App. at 1-3. The expansion of cellular phone data networks to third-generation (3G) technology, allowing data to transfer at suitable speeds to allow cell phones to send data to and from the Internet, did not roll out in Wisconsin until later in that same decade. MMS[6] technology rolled out even later.

This is not the first time the Court has been asked to apply the rules of statutory interpretation to technology which had not been contemplated when a statute was enacted. *See*, *e.g.*, Schill v. Wis. Rapids Sch. District, 2010 WI 86, ¶ 4, 327 Wis. 2d 572, 786 N.W.2d 177 (interpreting the application of the public records laws to school district maintained email). "The question is, and should be, how the words of a statute apply to a new factual situation. If the legislature

[5] "Short Messaging Service" – basic text messaging.

[6] "Multimedia Messaging Service" – picture messaging.

disagrees with our interpretation, it is free to debate the issue and pass legislation amending the statute." MercyCare Ins. Co. v. Wisconsin Com'r. of Ins., 2010 WI 87, ¶ 44 n. 17, 328 Wis. 2d 110, 786 N.W.2d 785.

The legislature created a schism between telephones and "computerized communication systems" over twenty (20) years ago. The logical extension of that split must hold communications occurring solely on the cellular data network would remain telephone communications and, therefore, not the use of a "computerized communication system." For a defendant's cellular phone use to violate Wis. Stat. § 948.075(1r), assuming the requisite intent, the communication must detour outside of the cellular data network to access the Internet either directly (through a mobile web browser on the phone) or indirectly (through the use of electronic mail or an Internet-enabled application on the phone).[7]

C. McKellips Did Not Use his Cellular Phone to Access the Internet While Communicating with his Accuser.

The State has argued McKellips used the Internet to download MMS messages sent to him by his accuser. Petitioner's Brief at 12. The only testimony in the record suggesting use of the Internet came from the State's "expert" cell phone repairman, Ryan Kaiser. R. 68 at 17, 25. Kaiser was testifying as an expert

[7] The Legislature's repeated use of "an electronic mail or other computerized communication system" in Wis. Stat. § 947.0125(2) makes clear that email is unambiguously a computerized communication system. Email servers, unlike text message communications, operate on the Internet.

witness for the first time, based on his knowledge of cell phone hardware.[8] R. 68 at 20. While Kaiser correctly states that the cell phone utilizes the "data" side of the phone network, he makes the assumption that "data" means "Internet." The assumption is wrong; while MMS messages utilize the cellular data infrastructure, that data never escapes the phone system to access the Internet. *See*, Supp. App. at 11.[9] Since McKellips and his accuser were both using the same model of phone and same pre-paid carrier, the MMS data stayed with TracFone during the journey from the accuser's phone to McKellips' phone.

The State's second witness offering testimony about multimedia messaging technology, Officer Matt Wehn, explicitly eschewed the expert witness designation. R. 68 at 109. Officer Wehn compiled the billing records from the various landline and cell phone providers introduced during the trial. R. 68 at 53-56. The Officer's testimony calls to light an additional problem with the State's assertion McKellips used the Internet: he never downloaded the MMS messages. The billing records Officer Wehn testified to showed ten (10) MMS messages from McKellips' accuser, but no minutes billed to McKellips' account related to

[8] The State believed it was required to prove the cellular phone was a computer, based on the title of Wis. Stat. § 948.075. 2015 WI App. 31, ¶ 10. Statute titles are not part of the statutes, and should not be interpreted as though they are. Wis. Stat. § 990.001(6).

[9] Given the confusion created from Kaiser's testimony, McKellips has filed a Supplemental Appendix alongside this brief. The Supplemental Appendix contains articles and publications intended to provide a common, basic understanding of how cell phones handle text messaging and data. If the Court decides that the accuser's sending of MMS messages to McKellips satisfies the "computerized communication system" element of Wis. Stat. § 948.075(1r) based solely on Kaiser's trial testimony regarding Internet data, the parties may be facing a different motion for a new trial after these proceedings are completed. *See, e.g.*, State v. Vollbrecht, 2012 WI App. 90, ¶ 34, 344 Wis. 2d 69, 820 N.W.2d 443.

those picture messages.[10] R. 68 at 102-103, 111, 113- 115. Minutes are the currency for pre-paid cell phones' use of the data network. R. 68 at 84. If, as was demonstrated at trial, there were no minutes associated with the MMS messages, McKellips did not use the cellular data network (much less the Internet) to obtain the content of the MMS messages. During his own testimony, McKellips indicated he was not able to access picture messages on his phone.[11] R. 69 at 100.

II. THE CIRCUIT COURT'S JURY INSTRUCTIONS ARE MISLEADING.

This Court has acknowledged the Court of Appeals has "broad power of discretionary reversal" to achieve justice when the real controversy has not been fully tried. Vollmer v. Luety, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). The Court of Appeals' discretion extends to cases "where, under the first test of Sec. 751.06, Stats., an error in the jury instructions or jury verdict occurred, but was waived." Id. at 20.

With respect to jury instructions, the circuit court likewise has discretion in preparing jury instructions. *See, e.g.*, Dakter v. Cavallino, 2015 WI 67, ¶ 31-32, 363 Wis. 2d 738, 866 N.W.2d 656. A circuit court erroneously exercises its discretion when it drafts jury instructions which "stat[e] the law incorrectly or in a

[10] MMS messages include an SMS message notifying the cell phone user as to the availability of the picture message. Supp. App. at 11; *see also,* R. 68 at 81-84.

[11] Knowing the picture component of the MMS messages alleged that McKellips' accuser was taking self-portraits in varying states of undress, one would think that a person actually having the criminal intent the State imputes onto McKellips would have taken the steps necessary to learn how to download MMS messages. R. 67 at 89.

misleading manner." Id. at ¶ 32. An erroneous instruction prevents a defendant from "having a full, fair trial of the issues of the case." Air Wisconsin, Inc. v. North Cent. Airlines, Inc., 98 Wis. 2d 301, 318, 296 N.W.2d 749 (1980).

McKellips acknowledges that Wis. JI-Criminal 2135 is an accurate statement of the law, save for the lack of a meaningful standard of what constitutes use of a "computerized communication system." It is due to the same lack of a meaningful standard the circuit court found it necessary to supplement the form jury instruction with the following language:

> 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 you in that determination, you are instructed that under Wisconsin law, a computer is defined as -- computer is defined as a 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.

R. 69 at 175. There are a number of distinct legal errors triggered by the supplement to the form jury instruction.

For starters, statutory interpretation only uses "closely-related" definitions to provide meaning to an undefined term. Kalal, 2004 WI 58, ¶ 46. While the word "computer" may supply a root word to "computerized communication system," the word and its usage in Wis. Stat. § 943.70 are not referenced or incorporated by Wis. Stat. § 948.075. *See, e.g.,* State v. Dartez, 2007 WI App. 126, ¶ 14, 731 N.W.2d 340, 301 Wis. 2d 499 ("Had the legislature intended this

definition to apply [to an unrelated statute] as well, it would have been a simple matter to state that"). The scope of application for all of the definitions in Wis. Stat. § 943.70(1) are expressly limited only to that statutory section. Wis. Stat. § 943.70(1). Those same definitions in Wis. Stat. § 943.70(1) were passed into law in April 1982,[12] and still reference "data" as something which exists on punched cards. *See,* Wis. Stat. § 943.70(1)(f). What a person of ordinary intelligence thinks of as a "computer" has changed significantly since these definitions were created, making their application to a statute enacted twenty (20) years later perilous at best.

More importantly for purposes of these proceedings, the additional language muddles the interpretation of the jury's role in the fact finding. The jury instruction suggests that any action involving a "computer" in even the loosest form of the word constitutes a "computerized communication system." Supplementing the definition of "computer" with the 1982 definition of "computer system" makes this problem readily apparent, adding another word from the term found in Wis. Stat. § 948.075 in context entirely foreign to its 1982 legislative purpose. The use of a "computerized communication system" is an essential element of the crime for which McKellips was charged. *See, e.g.,* Wis. JI-Criminal 2135; State v. Olson, 2008 WI App 171, 314 Wis. 2d 630, 762 N.W.2d 393. By instructing the jury as to what "Wisconsin law" defines as a "computer"

[12] 1981 Wis. Laws, Ch. 293. For purposes of comparison, the Commodore 64, one of the earliest mass market, home computers, was first released in August of 1982.

and a "computer system," the jury instruction obfuscates the instruction in a way that relieved the State of its burden of proving the "computerized communication system" element of the crime beyond a reasonable doubt. *C.f.*, McKellips, 2015 WI App. 31 at ¶ 21; Waddington v. Sarausad, 555 U.S. 179, 191 (2009).[13] *See also*, State v. Harvey, 2002 WI 93, ¶ 23, 254 Wis. 2d 442, 647 N.W.2d 189.

Out of the muddled distinction between "computer" circa 1982 and "computerized communication system" comes the third source of error. As noted by the Court of Appeals, the device used to access a "computerized communication system" is not itself the system. One of the major reasons McKellips has provided the Court with the supplemental appendix material regarding cellular phone networks and text messaging service is because the trial testimony does not provide a useful explanation of the technology to assist this Court in applying the elements of Wis. Stat. § 948.075(1r), much less leaving the question to a jury composed of persons presumed to have ordinary intelligence. While it may be possible for a jury hearing different testimony to differentiate between a cellular phone as being a component of a "computerized communication system," instead of the system itself, this jury was not provided

[13] Waddington requires the Defendant to show that the ailing instruction "so infected the entire trial that the resulting conviction violates due process." 555 U.S. at 191. Language from the definition of "computer" in Wis. Stat. § 943.70 was inserted by the State into its questioning of Ryan Kaiser (R. 68 at 11, 14, 16, 19) and the State's Closing Argument (R. 69 at 212). At oral argument before the Court of Appeals, the State acknowledged its mistaken belief that it needed to demonstrate "use of a computer." McKellips, 2015 WI App. 31 at ¶ 10. The State's confusion of the issue resulted in Wis. Stat. § 943.70(1)(am) serving as a stand-in for the "computerized communication system" element of the offense throughout the trial.

the information to draw that distinction in light of the circuit court's jury instructions.

III. THE LACK OF A UNIFORM STANDARD OF APPLICATION RENDERS WIS. STAT. § 948.075(1r) UNCONSTITUTIONALLY VAGUE.

There are two (2) standards under which a statute may be rendered unconstitutionally vague. Under the first prong of the vagueness test, a statute is deemed unconstitutionally vague when it fails to warn persons wishing to obey the law that their conduct comes near the proscribed area. State v. Pittman, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993). Under the second prong, the statute is void for vagueness when the enforcers of the law are unable to enforce the law without creating or applying their own set of standards. Id. "The ambiguity must be such that 'one bent on obedience may not discern when the region of proscribed conduct is neared, or such that the trier of fact in ascertaining guilt or innocence is relegated to creating and applying its own standards of culpability rather than applying the standards prescribed in the statute or rule.' " Id. at 277, *quoting* State v. Courtney, 74 Wis. 2d 705, 711, 247 N.W.2d 714 (1976).

A. Wis. Stat. § 948.075(1r) Provides no Enforcement Standard.

While there is "no simple litmus-paper test to determine whether a criminal statute is void for vagueness," the circumstances of the immediate case demonstrate how Wis. Stat. § 948.075(1r) provides no uniform standard of

application. State v. Popanz, 112 Wis. 2d 166, 332 N.W.2d 750 (1983). In the words of the circuit court:

> You [the Jury] must determine whether the phone described in the evidence constitutes a computerized communication system.

R. 69 at 175. While the remainder of the jury instruction – the errant nature of which has already been discussed – attempted to mitigate the lack of an understood, defined meaning of the phrase "computerized communication system," the statute, case law, and the pattern instruction do nothing to inform the jury how to reach the necessary determination. Leaving this critical determination in the hands of an unguided jury requires the jury to develop its own "ad hoc and subjective standards," inviting arbitrary enforcement and undermining due process. Popanz, 112 Wis. 2d at 176. The lack of definition invites guesswork by the jury, which decides the defendant's fate.

The statute is also not applied uniformly from case to case. The basic fact pattern of our case is similar to the unpublished[14] 2012 Court of Appeals decision in State v. Hamilton, with the notable exceptions that Hamilton used his cellular phone to connect to an Internet chat network, and was thus caught in an Internet sting operation by an undercover police officer posing as a fourteen (14) -year old girl. 2012 WI App. 52, ¶ 2, 340 Wis. 2d 740, 813 N.W.2d 247, 2012 WL 851230 (unpublished). The defendant in Hamilton attempted to raise this same

[14] In accordance with Wis. Stat. § 809.23(3), the decision in Hamilton is not cited for its legal holding but for how the same statute can produce a radically different standard when applied by another circuit court and prosecutor and how the lack of a defining standard informs the law of the case. A copy of the decision is included in McKellips' Supplemental Appendix, as to comply with Wis. Stat. § 809.23(3)(c).

constitutional vagueness challenge to Wis. Stat. § 948.075(1r), but failed because he was caught in an Internet sting activity attempting to arrange sexual activity with a child under the age of sixteen (16) – precisely the conduct for which the Legislature intended the statute to apply. *See,* Pittman, 174 Wis. 2d at 278 ("Furthermore, when the alleged conduct of a defendant plainly falls in the prohibited zone, the defendant may not base a constitutional vagueness challenge on hypothetical facts").

What makes Hamilton interesting from McKellips' perspective is not the constitutional challenge, but the alleged "computerized communication system": not the phone, not the Internet, but the GSM network on which the cellular phone connected to the Internet. 2012 WI App. 52 at ¶ 11. While the State would appear to borrow the mistaken invocation of Wis. Stat. § 943.70 from the Hamilton case,[15] the State did not introduce sufficiently comparable testimony about the cellular network on which McKellips' phone (and his accuser's phone) operated during McKellips' trial. Looking at the same statute and overlapping facts, law enforcement imposed – and asked the jury to impose - a different standard in the immediate case than had been applied (successfully) in another case. It is difficult to make the argument that Wis. Stat. § 948.075(1r) yields a uniform standard when the testimony placed before the respective triers of fact vary so critically as to the evidence of the "computerized communication system."

[15] 2012 WI App. 52 at ¶ 13-14.

B. Wis. Stat. § 948.075(1r) is Void for Vagueness.

Vagueness challenges under the first prong of the test are "based on what a reasonable person who is intent on obeying the law can be expected to understand the law prohibits." *See, e.g.,* State v. Chvala, 2004 WI App. 53, ¶ 17, 271 Wis. 2d 115, 678 N.W.2d 880. It is not enough to say that McKellips could have avoided violating the law by not having the criminal mens rea; while McKellips denies having any sexual intent towards his accuser (and was acquitted of the sexually-related felonies in the circuit court)[16], even a person having that intent should be able to obey the law by not using a "computerized communication system" with the requisite intent.

Taking a cue from the Order granting its Petition, the State argues that McKellips, and other persons of ordinary intelligence, should have known the cellular phone is a part of a "computerized communication system," despite all evidence, instruction, and argument at trial that the phone itself was the "computerized communication system." If we are to even argue the premise that persons of ordinary intelligence would be able to discern that the cellular network (voice, data, and Internet data), and not just the phone, constitutes the "computerized communication system" we must first acknowledge that the purported expert witness, the Judge approving the supplemental jury instruction after hearing the evidence, and the Assistant District Attorney who prosecuted the case – two (2) of the three (3) of whom graduated from law school – did not draw

[16] It screams aloud in this case that no texts containing any sexual innuendos were introduced in this trial.

the distinction the State now requests. Moreover, the State's new standard alleging that a computerized backbone to a communication system falls within the scope of the "computerized communication system" in Wis. Stat. § 948.075(1r) would criminalize handwritten letters mailed, bar-coded, and routed by the postal service's computer system, conduct far afield of the intended ambit of the statute itself.

A statute is not unconstitutional "because the boundaries of the prohibited conduct are somewhat hazy." State v. McCoy, 143 Wis. 2d 274, 286, 421 N.W.2d 107, *citing* State v. Wickstrom, 118 Wis. 2d 339, 352, 348 N.W.2d 183 (Ct. App. 1984). While statutes are sufficiently definite if the meaning of its terms can by ordinary sources of construction, there is also a requirement to give technical words and phrases their peculiar meaning. Id. at 286-287; see also, Wis. Stat. § 990.01(1). The Court of Appeals determined "computerized communication system" is a technical phrase, noting the repeated use of the phrase in multiple places within the Wisconsin Statutes. McKellips, 2015 WI App. 31 at ¶ 11. The State agreed during oral argument in the Court of Appeals, to giving a peculiar meaning to "computerized communication system" across its uses in the statutes. Id. at ¶ 12. The legislature employed a term with a peculiar meaning, which ordinary persons are required to employ, based upon the mandatory "shall" in Wis. Stat. § 990.01(1), but failed to define that term. Assuming a technical phrase has a distinct meaning, "computerized communication system" is supposed to mean something beyond the dictionary definitions of the three (3) component words to

the phrase. Wis. Stat. § 948.075(1r) is unconstitutionally void for vagueness because the legislature has left ordinary persons to guess at the interpretation of a phrase which should have been given a defined special meaning.

McKellips did not troll his way through Internet chat rooms, hoping to entice an anonymous stranger. He used his phone, in the same manner that millions of people use their phones every day: to have a conversation with a person he knew in real life; a conversation which included text messaging, a practice which has become increasingly common in the years following the creation of Wis. Stat. § 948.075(1r). There were no sexual texts exchanged. Virtually every means of communicating with another person more modern than two cans tethered by a length of string utilize computers (under the 1982 definition the State is fond of) in some form or another. The lack of a unifying statutory standard as to what does or does not constitute a "computerized communication system" makes it impossible for the statute to provide fair warning to the innocent. *See*, *e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

There is nothing in that pattern of activity which clearly falls within the realm of criminal conduct. Only through imputing a mental state onto McKellips to engage in the activities for which McKellips was acquitted could the communications be deemed potentially criminal. In this case, the evidence of McKellips' intent is severely lacking, as will be discussed in the harmless error analysis.

IV. HARMLESS ERROR ANALYSIS IS NOT NECESSARY WHEN A COURT DETERMINES THE REAL ISSUE WAS NOT FULLY TRIED IN THE CIRCUIT COURT.

The matter before this Court marks the intersection of two (2) related issues: the discretionary grant of a new trial for failing to try the genuine issue, and a jury instruction which alleviated one or more elements the State was required to prove. Only the latter of those issues requires a harmless error analysis. *See, e.g.*, State v. Beamon, 2013 WI 47, ¶ 25, 347 Wis. 2d 559, 830 N.W.2d 681.

On its face, it is simple to understand why a discretionary reversal and new trial order does not hinge on a hypothetical assessment of the jury's leanings and ample authority for doing so. Root v. Saul, 2006 WI App. 106, ¶ 29, 293 Wis. 2d 364, 718 N.W.2d 197 ("…if we reverse on that theory, we need not determine whether the outcome of the trial would have been different on retrial."); Vollmer v. Luety, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990) ("Under this first category, it is unnecessary for an appellate court to first conclude that the outcome would be different on retrial"); Air Wisconsin, Inc, 98 Wis. 2d at 317-318 ("On the basis of the record before us, we cannot say that the defendant would probably win on a retrial…but we can conclude that the instruction played a significant role in the jury's determination…and that the instruction, if erroneous, prevented the defendant from having a full, fair trial of the issues of the case"). The process leading to the jury's decision was tainted by the Court's misleading jury instructions; "the impossible task" given to the jury undermines the public interest in conducting fair trials. McKellips, 2015 WI App. 31 at ¶ 21.

V. THE STATE CANNOT PROVE HARMLESS ERROR BEYOND A REASONABLE DOUBT UNDER THE FACTS OF THIS CASE.

When reviewing a conviction based on a jury instruction including an erroneous requirement, the court must determine whether, beyond a reasonable doubt, a rational jury would have found the defendant guilty, absent the presence of the error. Beamon, 2013 WI 47 at ¶ 27 (internal citations omitted). This is accomplished by reviewing the sufficiency of the evidence presented by the State in comparison to the elements of the offense[17], under the totality of the circumstances. Id. at ¶ 28.

A. Use of a "Computerized Communication System."

The essential question the Court must navigate when reviewing the totality of the circumstances is whether McKellips' use of his cellular phone, to send calls and text messages, is a violation of the "computerized communication system" element of the case, in the context intended by the legislature. That issue has already been addressed by the parties' briefs, and McKellips will not re-hash those arguments here aside from acknowledging that the Court's decision on the undefined phrase will reverberate in the harmless error analysis.

[17] McKellips concedes the element of Wis. Stat. § 948.075(1r) relating to the age of his accuser.

B. Intent.

The State hangs its hat on two (2) things when imputing a sexual intent on McKellips' actions: the accusations of sexual contact for which McKellips was acquitted, and the frequency of the communication between McKellips and his accuser. Their initial brief to this Court goes through the allegations in painstaking detail, leaving out inconsistencies, like the presence of other persons in the McKellips home, when these allegations were said to have taken place (R. 69 at 8, 40-41), the picture window through which the salacious content would have been displayed to McKellips' neighborhood or any random passerby, (R. 50 at Ex. 57-59), and the accuser's failure to correctly relay unique details[18] of the events in a manner which cast considerable doubt on her version of the story. Sexual contact and exposure of genitals are strict-liability offenses, conduct violating the statutes without an intent element, for which the State failed to secure a conviction on either charge.

If the jury did not believe, beyond a reasonable doubt, that the accusations actually took place, how can it follow that the same jury would believe McKellips had the intent to cause events which did not actually happen? As noted earlier, there were only three (3) sentences of McKellips' text messages to his accuser read into the trial. His accuser's text acknowledging a lack of sexual contact with McKellips upon the discovery of her second phone included more words than all of McKellips' evidentiary texts combined. R. 67 at 131-132. Moreover, in a

[18] *C.f.,* R 67 at 147-148; R. 69 at 33-34, 107.

showing display of the absence of sentimentality or romance, neither McKellips nor his accuser retained their text messages any longer than the phone companies did. Perversely, the State used the absence of these messages to its advantage, shamelessly making up messages from McKellips to suggest intent not present in the actual text of the texts. R. 69 at 197. While the text messages between McKellips and his accuser demonstrate friendship, the scarcity of preserved texts makes it impossible to distinguish the platonic from the erotic, much less distinguishing between the two (2) beyond a reasonable doubt.

What the State fails to prove by content, it attempts to resolve by volume. To be sure, there were a large number of communications between McKellips and his accuser, but the commitment to the conversation was asynchronous. The overwhelming majority of the text messages, according to the State's own tally, were texts received by McKellips; for every three (3) texts McKellips received, he only sent two (2).[19] If the number of text messages demonstrates anything conclusively, it would be that McKellips was the one responding to the conversation, not driving it with any sense of intention.

C. Other Act Facilitating Intent.

Outside of the sex the jury did not believe McKellips and his accuser engaged in, the State only provided one (1) example of an "other act" to facilitate

[19] 4,690 incoming text messages (to McKellips), 3108 outgoing text messages (from McKellips). R. 69 at 118.

the requisite intent: McKellips buying a cellular phone for his accuser. R. 69 at 213. In another case interpreting the statute, the Court of Appeals has interpreted the requirement that the other act under Wis. Stat. § 948.075(1r) "effect" the defendant's intent:

> Accordingly, we read the statute to require that, before the State may obtain a conviction under WIS. STAT. § 948.075, the defendant must have done an act to accomplish, execute, or carry out the defendant's intent to have sexual contact with the individual with whom the defendant communicated. More significant for purposes of this decision, the statute requires that the act be something *other than* "us[ing] a computerized communication system to communicate with the individual."

State v. Olson, 2008 WI App 171, ¶ 11, 314 Wis. 2d 630, 762 N.W.2d 393 (emphasis in original).

Much like the Court in Olson, it is certainly possible to entertain hypothetical scenarios wherein the buying of the cellular phone could play a role in carrying out an intention to have sexual contact. Id. at ¶ 18. A phone-for-sex *quid pro quo*, for instance, or placing an inappropriate picture on the phone before giving it to a minor, could constitute such an "other act" to satisfy the statute. That is not what took place in this case, however. All that McKellips accomplished by purchasing the phone was to continue his conversation through a marginally different channel of communication (a different phone, with a new phone number). This is far from the smoking gun demonstrative of intent in other cases. *See*, Id. at ¶ 22-23, *citing* State v. Schulpius, 2006 WI App. 263, 298 Wis. 2d 155, 726 N.W.2d 706. Absent anything sexually explicit in the act of purchasing a

cellular phone, the other act element of the statute has not been satisfied beyond a reasonable doubt.

VI. EXCEPTIONAL CASE ANALYSIS SHOULD BE RESERVED ONLY FOR REVERSALS BASED ON NEWLY-DISCOVERED EVIDENCE.

The State has asked the Court to determine whether the Court of Appeals abused its discretion in reversing the circuit court's decision based upon the misleading jury instruction. According to the State, the Court of Appeals failed to explain to the State's satisfaction whether the immediate case is exceptional. Petitioner's brief at 31-32. The basis for the exceptional case question stems from this Court's decision in State v. Avery, 2013 WI 13, 345 Wis. 2d 407, 826 N.W.2d 60.

In Avery, this Court reversed a discretionary reversal by the Court of Appeals, following a Wis. Stat. § 974.06 collateral attack by defendant. Id. at ¶ 2. The basis for the Court of Appeals reversal involved the use of technology (digital photogrammetry) that did not exist at the time of the trial, the use of which allowed an expert witness to conclude the convicted defendant was too tall to have been the person shown in a video committing the robbery for which defendant was convicted. Id. While the video in Avery was shown to the jury, the State asked the jury not to make identifications from the video, and the new technology did not undermine the witness identification of the defendant at the robbery, nor the defendant's confession to, and apologies for, the robbery. Id. at ¶ 42. The Court

took issue with the Court of Appeals' claim in Avery that the real issue was not tried, on the basis of the other evidence presented in the case. Id. at ¶ 37-39, ¶ 56.

The Avery Decision distinguished between the collateral attack in that case as opposed to similar collateral attacks in State v. Hicks and State v. Armstrong, cases where DNA analysis undermined "pivotal pieces of evidence forming the foundation of the State's case." Avery, 2013 WI 13 at ¶ 41; 202 Wis. 2d 150, 549 N.W.2d 435 (1996); 2005 WI 119, 283 Wis. 2d 639, 700 N.W.2d 98. The distinction was drawn as to use of new technology which did more than " 'chip away' at the accumulation of the State's case." Avery, 2013 WI 13 at ¶ 53 (internal citations omitted). The Court's decision in Avery suggested a balancing test in determining whether a case was so exceptional as to warrant a new trial.

> The judicial system has limited resources, and judicial policy favors finality of convictions. … In a truly exceptional case, those interests do not trump the defendants' interest in having the real controversy fully tried.

Id. at ¶ 57 (internal citation omitted).

While the immediate case does involve changes in technology, the facts and posture of the case are significantly different from Avery, Hicks, and Armstrong. The immediate case is a direct appeal, not a collateral attack on an otherwise final judgment of conviction; judicial policy should not favor finality of a conviction where that conviction was overturned at the earliest opportunity possible. Discretionary reversal decisions should be treated differently in collateral attack proceedings, as opposed to direct appeal. *See, e.g.*, Avery, 2013 WI 13 at ¶ 74 (Prosser, J., concurring).

Newly-discovered evidence reversals, like in Avery and its predecessors, require a showing of "manifest injustice," including a requirement the defendant show, by clear and convincing evidence, "a reasonable probability…that a different result would be reached in a trial." Id. at ¶ 25. The "manifest injustice" test for reversal based upon newly-discovered evidence, and the "extraordinary case" test in Avery for reversal in the interests of justice represent opposite sides of the same coin; evidence which only "chips away" at the State's case – without compromising the evidence on which the prosecution relied – is evidence which would be insufficient to demonstrate "that a different result would be reached in a trial." Before rendering its exceptional case analysis, the Avery Decision had already rejected the notion that a jury reviewing the newly-discovered evidence would have reasonable doubt as to Avery's guilt. Id. at ¶ 36. Extending Avery beyond cases involving collateral attack and newly-discovered evidence is the State's second attempt to impose a harmless error-equivalent test on the Court of Appeals' discretion to grant a defendant a new trial in the interests of justice, a test which the Court has refused to do impose in the past. *See*, *e.g.*, Vollmer, 156 Wis. 2d 1 at 19.

VII. THE COURT OF APPEALS, NEVERTHELESS, ACTUALLY CONDUCTED THE EXTRAORDINARY CASE ANALYSIS SUGGESTED BY STATE V. AVERY.

While McKellips does not believe the Court of Appeals' reversal decision requires a demonstration and explanation of how the State's evidence was

compromised, the difference in the immediate case may well be inconsequential. As acknowledged by the State, it is not necessary for the Court of Appeals to utilize any specific magic words to satisfy the "exceptional case" analysis imposed by Avery. 2013 WI 13 at ¶ 55 n. 19. Unlike the decision in Avery, the Court of Appeals' analysis *did* analyze the grounds and precedent for granting discretionary reversal. McKellips, 2015 WI App. 31 at ¶ 18-19. While the discretionary reversal was not based on Hicks, the case referenced in the Avery footnote, the Court of Appeals cited Hicks in its analysis in addition to citing multiple cases demonstrating reversal authority where the real controversy was not fully tried due to a significant issue in the verdict or jury instructions. *C.f.,* McKellips, 2015 WI App. 31 at ¶ 19; Avery, 2013 WI 13 at ¶ 55 n. 19.

While the State obviously disagrees with the Court of Appeals' decision in this case, the Court of Appeals also demonstrated why the immediate case is more like the facts in Hicks and Armstrong than the facts of Avery. The "impossible task" given to the jury in the circuit court's jury instruction went to whether the cell phone was a "computerized communication system," an essential element of Wis. Stat. § 948.075(1r). McKellips, 2015 WI App. 31 at ¶ 21. Indeed, the Court of Appeals referred to the question of whether McKellips' use of the phone qualified as use of a "computerized communication system" as having been "the

primary issue at trial."[20] Id. at ¶ 22. This is not an evidentiary issue which merely "chips away" at the State's case; the State cannot convict McKellips under Wis. Stat. § 948.075(1r) if the use of his cellular phone does not constitute use of a "computerized communication system," the very question which was blurred by the circuit court's errant jury instruction.

CONCLUSION

Wis. Stat. § 948.075(1r) is a vestigial statute, a legislative solution to a problem the Court had resolved before the statute was first published. The statute was left unconstitutionally vague by the legislature, as it provides no standards for determining the scope of a "computerized communication system," punting the standards question to the *ad hoc* reasoning of the jury system. The Court of Appeals' reversal of McKellips conviction should be upheld, as the Court of Appeals acted within its reversal discretion. In affirming the decision of the Court of Appeals, the Court should either strike down Wis. Stat. § 948.075(1r) as

[20] As demonstrated by the State's statement of fact in Petitioner's brief, the primary issue tried to the jury in the circuit court was the alleged sexual assault for which McKellips was acquitted. The primary issue on the charge which forms the basis for the direct appeal, however, is certainly the question of whether use of the cellular phone constitutes use of a "computerized communication system" as that term is used in Wis. Stat. § 948.075(1r).

unconstitutional, or otherwise establish a standard requiring a "computerized communication system" to interact with the Internet.

Dated this 24th day of February, 2016.

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FORM AND LENGTH 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 8,713 words.

Signed this 24th day of February, 2016.

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CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I hereby certify that on February 24, 2016, this brief was delivered to a third-party commercial carrier for delivery to the Clerk of the Supreme Court within 3 calendar days. I further certify that the brief was correctly addressed.

Signed this 24th day of February, 2016.

By: _____
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SUPPLEMENTAL APPENDIX CERTIFICATION

I herby certify that filled with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with s. 809.19(3)(b) and that contains, at a minimum: (1) a table of contents; and (2) a copy of any unpublished opinion cited in the accompanying brief.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names or persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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ELECTRONIC BRIEF AND APPENDIX CERTIFICATION

I hereby certify that I have submitted an electronic copy of this brief, including the supplemental appendix, which complies with the requirements of § 809.19 (12).

I further certify this electronic brief and supplemental appendix are identical in content and format to the printed (paper) form of the brief and supplemental appendix in transit for delivery and filing as of this date.

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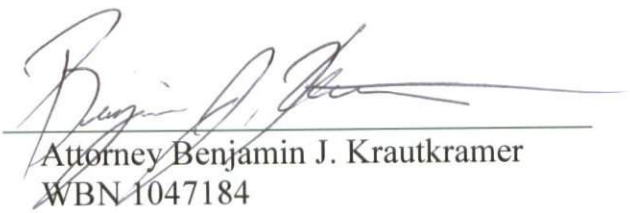
By: 

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