STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2014AP827-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

RORY A. MCKELLIPS,

Defendant-Appellant.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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

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NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Wisconsin Association of Criminal Defense Lawyers ("WACDL"), submits this non-party brief addressing the proper interpretation of Wis. Stat. §948.075(1r).

This appeal addresses the appropriate interpretation of Wis. Stat. §948.075(1r). Although the case focuses on the requirement that the defendant used "a computerized communication system," the Court likely will make reference to the remaining elements of that offense as well. Because the intricacies of the statute are not readily apparent and the current standard jury instructions for the offense are inaccurate for some contexts in which the statute may apply, WACDL believes it important to identify those intricacies and inaccuracies for the Court so it does not unintentionally enshrine them into a decision that would cause confusion and unjust results that only this Court would be able to correct.

ARGUMENT

THE PROPER INTERPRETATION OF WIS. STAT. §948.075(1r) MUST ACCOUNT FOR ALL THE STATUTORY LANGUAGE AND ALL POTENTIAL APPLICATIONS

While there is no dispute that the alleged victim in this case is a child, there is no requirement in Wis. Stat. §948.075(1r) that the person with whom the defendant communicated in fact is under 16 years of age. Indeed, the statutory language only requires that the defendant "believes or has reason to believe" that the person is under 16 years old. This provision accordingly has been used by police officers and other adults pretending to be children in attempts to ensnare those believed (correctly or otherwise) to be potential predators. *E.g.*, ***State v. Bvocik***, 2010 WI App 49, 324 Wis.2d 352, 781 N.W.2d 719.

These two decidedly different applications of the statute - one involving a real child and the other in which an adult merely pretends to be a child - concern different interests which are addressed differently in the statute's language and scope. Unfortunately, the standard jury instruction and its comments fail to reflect those differences. In the process, they effectively delete critical statutory language and expand the scope of the statute to conduct involving only adults and that is not merely harmless but constitutionally protected as well.

As explained below, the statutory language as written does not suffer from these defects and in fact fully shields both children and protected conduct by adults. This protection results from the statutory requirement limiting conviction to when the defendant acts "with intent to have sexual contact or sexual intercourse with the individual in violation of s. 948.02 (1) or (2)."

A. Properly Construed, Wis. Stat. §948.075(1r) Distinguishes Between Conduct Involving Children and That Involving Adults Pretending to Be Children

As explained below, §948.075(1r) addresses the differences between communications involving actual children and those involving

adults pretending to be children through its two independent *mens rea* requirements. Specifically, where an actual child is involved, it is sufficient that the defendant had reason to believe the person he or she was communicating with was a child. This objective reasonableness standard differs from the purely subjective standard applicable when the other person is an adult. When the other person is an adult, it is necessary under the statute and the Constitutional that the defendant in fact believe that the person was a child.

1. Applicable legal standards

When interpreting a criminal statute, the question is not what interpretation would serve to uphold the conviction, but what the Legislature intended. Accordingly, interpretation of a statute begins with its language. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. If the meaning is plain, the inquiry should stop. ***Id.*** Plain meaning may be ascertained not only from the words employed in the statue, but from the context. ***Id.*** ¶46. Thus, courts interpret statutory language in the context in which the words are 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.*** Moreover, "statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." ***Id.***

Whether intent is an element of an offense within Wisconsin's Criminal Code, as indicated in Wis. Stat. §939.23(1), is dictated by the term "intentionally," the phrase "with intent to," the phrase "with intent that," or some form of the verbs "know" or "believe."

Statutory interpretation is a legal determination reviewed *de novo*. ***State v. Setagord***, 211 Wis.2d 397, 405-06, 565 N.W.2d 506 (1997).

2. Section 948.075(1r) distinguishes between cases involving children and those involving adults pretending to be children

Section 948.075(1r) provides:

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

By its terms, therefore, the statute imposes two independent *mens rea* requirements. First, the statute only applies where the defendant "believes or has reason to believe" the person with whom he or she is communicating "has not attained the age of 16 years." "Believes" is a subjective standard while "reason to believe" is an objective one. This first *mens rea* element or "screen" thus is quite broad and does not require either that the person communicated with be a child or, so long as there is "reason to believe" the person to be a child, that the defendant actually believe the person is a child.

However, the Legislature further limited application of §948.075(1r) through the second, independent *mens rea* requirement that the defendant act "with intent to have sexual contact or sexual intercourse with the individual *in violation of s. 948.02 (1) or (2).*" (Emphasis added).

Pursuant to Wis. Stat. §939.23(4):

> "With intent to" or "with intent that" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result.

The Legislature thus meant to require that the defendant had the purpose, not only to "have sexual contact or sexual intercourse with the individual," but to do so "in violation of s. 948.02(1) or (2)."

Wis. Stat. §§948.02(1)&(2) criminalize various sexual offenses involving children. To provide maximum protection to real children, direct violation of those provisions does not require knowledge of the victim's minority. Wis. Stat. §939.23(6).

However, by requiring that the defendant act "with intent to have sexual contact or sexual intercourse with the individual in violation of s. 948.02 (1) or (2)," the Legislature has made clear that the sanctions

of §948.075(1r) apply *only* when the defendant in fact intended to commit an act which would have constituted sexual assault of a child under 16 years of age if the facts were as the defendant believed them to be. This restriction makes sense because "[p]ersons employing the internet lack the means to ascertain reasonably the age of the persons with whom they are corresponding." ***State v. Weidner***, 2000 WI 52, ¶34, 235 Wis.2d 306, 611 N.W.2d 684; *see* ***id.***, ¶29 ("Participants in chat rooms often assume pseudonyms and do not divulge truthful personal data").

Thus, if the subject of communication is 16 years of age or over, then actual belief that the person is a child is required. Because sections 948.02(1) and (2) require an actual child, the defendant simply cannot intend to have sex with an adult "in violation of" those sections, unless the defendant actually believes the adult really is a person under 16. Of course, if the defendant believes the subject to be under 16, then the defendant intended to have sex with someone who in fact was a child (which would violate §948.02(1) or (2)) and the fact that the subject actually was an adult does not alter that intent.

However, if the subject in fact *is* under 16, actual knowledge or belief as to age is not necessary for violation of §948.02(1) or (2). Wis. Stat. §939.23(6). "[R]eason to believe" is sufficient under §948.075(1r) when the subject in fact is under 16 because *any* sex with that person would be "in violation of s. 948.02(1) or (2)." Unlike the previous scenario, intent to have sex with that person necessarily would equate to intent to have sex "in violation of s. 948.02(1) or (2)," regardless of the defendant's beliefs as to the person's age.

	Person under 16	**Person 16 or older**
Def't Believes Person under 16	Guilty	Guilty
Def't Believes Person 16 or older but "reason to believe" under 16	Guilty	Not Guilty

The authors of Wis. JI-Crim. 2135 missed the import of the

statutory language, impermissibly construing it as mere surplusage, and thus effectively deleted the statutory requirement that the defendant act "in violation of s. 948.02(1) or (2)" when the other person is an adult. Instead, the instruction merely requires that the defendant act "with intent to have sexual contact or sexual intercourse with the individual." *See* WACDL App. 1-4. The Committee Comment notes its rationale as follows:

> 1. The statutory definition of the crime refers to "sexual contact or sexual intercourse in violation of s. 948.02(1) or (2)." The reference to the statute numbers was not included in the instruction because the Committee concluded that it was not necessary. Any sexual contact or sexual intercourse with a person under the age of 16 is a violation of § 948.02(1) or (2).

WACDL App. 3.

The Committee thus overlooks the fact that an actual child victim is not required for conviction under §948.075(1r) and violates the cardinal rule of statutory construction to give effect to all statutory language when possible. *See* ***Kalal***, 2004 WI 58, ¶46 ("statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage"). If the Legislature only intended that the defendant act with the intent to have sex with the individual regardless of that person's actual age, it would not have added the requirement that he intend to do so "in violation of s. 948.02(1) or (2)." Rather, it would have merely required that the defendant communicated with someone he or she believed or had reason to believe was under 16 "with intent to have sexual contact or sexual intercourse with the individual."

3. When the defendant communicates with another adult, the Constitution mandates that any conviction under §948.075(1r) be based on proof that the defendant actually believed that the person nonetheless was a child

Giving effect to the plain language of the statute also is necessary because the Constitution bars criminalizing (and subjecting to a potential 40-year sentence) the acts of those who correctly believe

they are communicating with adults, regardless of whether they have reason to believe otherwise. ***State v. Stevenson***, 2000 WI 71, ¶27, 236 Wis. 2d 86, 613 N.W.2d 90 (statutes to be interpreted to preserve their constitutionality when possible).

If construed as authorizing criminal conviction of those who, for purposes of arranging a sexual encounter, communicate with another adult while actually believing that person is an adult, §948.075(1r) violates the individual's constitutional right to adult consensual sexual privacy. *See, e.g.*, ***Lawrence v. Texas***, 539 U.S. 558, 578 (2003)(one's "right to liberty under the Due Process Clause gives them the full right to engage in [private sexual] conduct without intervention of the government").

Nor can the redaction of the "in violation of s. 948.02(1) or (2)" requirement of §948.075(1r) be upheld because the provision involves communication rather than actual sexual conduct. "Solicitation is a recognized form of speech protected by the First Amendment." ***United States v. Kokinda,*** 497 U.S. 720, 725 (1990). *Cf.* ***United States v. Meek***, 366 F.3d 705, 718 n.14 (9th Cir. 2004) ("the non-obscene inducement of one adult into consensual sexual activity with another individual known or believed to be an adult is not within the reach of [18 U.S.C.] §2422(b)").

Moreover, "[s]exual expression which is indecent but not obscene is protected by the First Amendment." ***Sable Communications of Cal., Inc. v. FCC***, 492 U.S. 115, 126 (1989). *See* ***id.*** at 130-131 (striking down "dial-a-porn" ban that had "the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear"); ***Reno v. American Civil Liberties Union***, 521 U.S. 844, 875 (1997) (The "governmental interest in protecting children from harmful materials ... does not justify an unnecessarily broad suppression of speech addressed to adults").

CONCLUSION

When an actual child is involved, the statutory language and constitutional principles authorize conviction under §948.075(1r) based

on *either* the defendant's subjective belief *or* an objective "reason to believe" that the person is a child. However, when the person is an adult pretending to be a child, the statutory requirement that the defendant act "with intent to [violate] s. 948.02(1) or (2)" dictates that the statute is violated *only* when the defendant subjectively believes the person to be a child.

For these reasons, WACDL respectfully asks that the Court's decision in this matter either reflect the proper interpretation of §948.075(1r) as presented in this brief or reflect the fact that it is not deciding the proper interpretation of that statute in the context when the individual with whom the defendant was communicating was an adult.

Dated at Milwaukee, Wisconsin, March 9, 2016.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

This brief conforms to the rules contained in Wis. Stat. (Rule) 809.19(8)(b) & (c) for a non-party brief produced with a proportional serif font. The length of this brief is 2,236 words.

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Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

_____
Robert R. Henak

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 8th day of March, 2016, I caused 22 copies of the Nonparty Brief of Wisconsin Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

_____
Robert R. Henak

McKellips Amicus Brief.wpd