STATE OF WISCONSIN

IN SUPREME COURT

No. 2014AP827-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

RORY A. MCKELLIPS,

Defendant-Respondent.

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

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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TABLE OF CONTENTS

CASES CITED

Page

Page

STATUTES CITED

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INTRODUCTION

For the reasons set forth in the State's brief-in-chief, as well as in this reply brief, the State respectfully requests that this Court reverse the decision of the court of appeals, which reversed Rory A. McKellips's conviction.

ARGUMENT

As a preliminary matter, the State notes that much of McKellips's statement of the case is misleading. First, McKellips suggests that the State introduced only two text messages from McKellips to CH into evidence.[1] That assertion takes those texts out of context, ignoring that the State produced evidence that over a nearly fifty-day period in 2011, those text messages were two of 738 that McKellips sent to CH (68:65).

Second, and similarly misleading, is McKellips's characterization of trial testimony. For example, McKellips states that CH "saw time spent talking with Rory McKellips and wife, Connie McKellips, as an escape from her home life."[2] This is not an established "fact," but McKellips's interpretation of Connie's testimony (69:43). Similarly, McKellips states as fact that CH asked him to buy her a cell phone.[3] Although McKellips testified that CH asked him to buy her the cell phone (69:118), this is not what CH testified to. CH testified that she told McKellips that after her mom had received a cell phone bill with roaming charges incurred as a result of CH's conversation with McKellips, her mom told her that if he wanted to talk to her, he would have to call her on their home phone (67:33-34). According to CH, then, McKellips told her that he would get her a cell phone so that he would be able to contact her (67:34). McKellips's presentation of disputed facts in his statement of the case as established truths is disingenuous.

In addition, McKellips states that it was "[d]ue to a variety of inconsistencies in the testimony, including the

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[1] McKellips's Br. at 8.

[2] McKellips's Br. at 8.

[3] McKellips's Br. at 8.

presence of other people in the home who dispute the occurrences," that the jury found McKellips not guilty of sexual assault and exposure.[4] It is inappropriate to speculate on the reason the jury returned its not guilty verdicts in this manner. "Juries have always had the inherent and fundamental power to return a verdict of not guilty irrespective of the evidence." *See State v. Thomas*, 161 Wis. 2d 616, 630, 468 N.W.2d 729 (Ct. App. 1991).

I. The plain language of Wis. Stat. § 948.075(1r) prohibits the use of a cell phone to send text messages to facilitate sex with a minor.

McKellips argues that Wis. Stat. § 948.075(1r) was conceived and enacted to address "the Internet anonymity to target children."[5] In support of this position, he points to the timing of the legislation, which was enacted shortly after this Court decided *State v. Robins*, 2002 WI 65, 253 Wis. 2d 298, 646 N.W.2d 287. In *Robins*, the "primary issue [was] whether the child enticement statute is violated when there is no actual child victim, but, rather, an adult government agent posing online as a child." *Robins*, 253 Wis. 2d 298, ¶1. This Court concluded that the State may charge a defendant with attempted child enticement under Wis. Stat. § 948.07 "where the intervening extraneous factor that makes the offense an attempted rather than completed crime is the fact that unbeknownst to the defendant, the 'victim' is not a child at all, but an adult posing as a child." *Id.* ¶3. From this, McKellips suggests that "[i]t would be the height of absurdity to suggest the legislature drafted Wis. Stat. § 948.075(1r) addressing the

[4] McKellips's Br. at 9-10 (McKellips also wrongly states that he was charged with sexual contact).

[5] McKellips's Br. at 19.

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 law."[6] And that "[t]here 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 operations which created the legal controversy."[7]

The problem with McKellips's argument is at least two-fold. First, as McKellips admits, there are no notes in the act that led to Wis. Stat. § 948.075(1r) so McKellips's assertion that § 948.075(1r) is directly tied to *Robins* is speculation.[8]

Second, and more importantly, the plain language of the statute belies McKellips's assertion that the statute addresses only "the attempted sexual assault of minors via the Internet[.]"[9] "When we interpret a statute, we begin with the statute's plain language, as we assume the legislature's intent is expressed in the words it used." *Mayo v. Boyd*, 2014 WI App 37, ¶8, 353 Wis. 2d 162, 844 N.W.2d 652 (citation omitted). Here, the statute clearly applies whether there is a victim or not, whether the defendant is successful or not in his attempt to inflict the sexual contact or assault, and whether the "computerized communication system" accesses the Internet or not. McKellips's argument that there is "nothing" in the statute that supports the State's argument that the Internet is not a component of the statute is incorrect. The word "Internet" is not in the statute. Surely if the Legislature had wished to criminalize only those who use the Internet to lure minors into

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[6] McKellips's Br. at 19.

[7] McKellips's Br. at 19.

[8] McKellips's Br. at 18.

[9] McKellips's Br. at 19.

sexual activity, it would have said so. A plain reading of the statute reveals the Legislature's broader intent. *See id.*

Equally unpersuasive is McKellips's argument that the Legislature has created a "schism" between the law that prohibits the unlawful use of a telephone and the law prohibiting the use of a computerized communication to facilitate a child sex crime.[10] Pursuant to Wis. Stat. § 947.012, the Legislature has prohibited certain uses of a telephone. For example, it is a Class B misdemeanor makes a telephone call to threaten someone with the intent to intimidate the person. Wis. Stat. § 947.012(1)(a). Similarly, it is a Class B misdemeanor to use a computerized communication system to send a threatening message to a person with the intent to intimidate the person. Wis Stat. § 947.0125(2)(a). And it is a Class C felony to use a computerized communication system to facilitate a child sex crime. Wis. Stat. § 948.075(1r). The existence of a statute prohibiting certain telephone *calls* does not preclude the Legislature from also criminalizing the use of a telephone to violate § 948.075(1r).

Finally, McKellips argues that he did not use his phone to access the Internet in his communication with CH and, by implication, he therefore could not have violated Wis. Stat. § 948.075(1r).[11] As stated, there is no requirement in the statute that an offender access the Internet to be guilty of violating § 948.075(1r). But the State notes that McKellips misstates the record when he asserts that the "only testimony in the record" that suggests that he used the Internet came from Ryan Kaiser.[12] But this misstates the record. Kaiser testified that in order to

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[10] McKellips's Br. at 17, 21.

[11] McKellips's Br. at 21-23.

[12] McKellips's Br. at 21.

download a picture on McKellips's phone, the phone would need to access the Internet (68:24).[13] 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 cell phone and sent the pictures to McKellips's cell phone (67:89-90). When CH was asked, "Was there anything that led you to believe that [McKellips] received [the pictures]?" she replied, "Well, he asked me to take the pictures and send them to him, and he would say like, thanks, or I liked your picture" (67:90). And Mosinee Police Officer Matt Wehn testified that his review of McKellips's cell phone bill led him to deduce that McKellips had downloaded ten multimedia messages from CH (68:51, 85, 113-15).

II. The jury instructions were clear.

McKellips does not seem to complain about the standard jury instruction given in the case, but instead about the additional language the circuit court employed.[14] In addition to taking issue with what the court of appeals viewed as a problem – the circuit court's statement that the jury must determine whether the cell phone McKellips used was a computer – McKellips faults the circuit court's recitation of the

[13] McKellips now challenges Kaiser's testimony that the "data side" of a cell phone's usage pertains to the Internet. McKellips's Br. at 22. In support of his position, McKellips offers material outside of the record. These materials are not appropriately before this Court. *See South Carolina Equip., Inc. v. Sheedy*, 120 Wis. 2d 119, 125-26, 353 N.W.2d 63 (Ct. App. 1984) ("An appellate court can only review matters of record in the trial court and cannot consider new matter attached to an appellate brief outside that record.").

[14] McKellips's Br. at 24-27.

statutory definition of "computer" and "computer system."[15] McKellips's arguments fall flat.

The crux of McKellips's argument appears to be that the definition of "computer" was written in 1982.[16] But he fails to explain how this definition harms him in any way or how it should be altered.[17] McKellips argues that "the additional language" in the jury instruction "muddles the interpretation of the jury's role in the fact finding[,]" but McKellips fails to explain how the court's definitions of "computer" and "computer system" could have confused the jury.

The jury was instructed that in order to find McKellips guilty of the use of a computer to facilitate a child sex crime, it must find that he – among other things – used a computerized communication system (69:174-75). This instruction was straightforward.

III. Wisconsin Stat. § 948.075(1r) is constitutional.

McKellips argues that Wis. Stat. § 948.075(1r) is unconstitutionally vague because it lacks enforcement standards.[18] In support of this argument, and in violation of Wis. Stat. § 809.23(3), McKellips cites an unpublished, per curiam case from the court of appeals.[19] Because the State has

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[15] McKellips's Br. at 24.

[16] McKellips's Br. at 25.

[17] McKellips argues that the statute defines "'data' as something which exists on punched cards." McKellips's Br. at 25. But the statute states, "Data may be in *any form* …." Wis. Stat. § 943.70(1)(f) (emphasis added).

[18] McKellips's Br. at 28.

[19] McKellips's Br. at 28. McKellips's attempt to circumvent Wis. Stat. § 809.23(3) is unavailing. The rules are clear: citations to unpublished, per

no duty to research or respond to an unpublished decision that is citable for its persuasive value, the State shall not respond to an opinion that McKellips is prohibited from citing. *See* Wis. Stat. § 809.23(3)(b).

All that remains, then, of McKellips's argument that the statute is unconstitutionally vague based on enforcement standards is his argument that juries will develop their own standards and that this will somehow invite "arbitrary enforcement" and that it "undermin[es] due process."[20] The State agrees that a vague law that "impermissibly delegates basic policy matters to … juries for resolution on an *ad hoc* and subjective basis" would be problematic. *State v. Popanz*, 112 Wis. 2d 166, 173, 332 N.W.2d 750 (1983). But McKellips's argument that the statute is vague in this way does not rise above the superficial. Further, the statute is "not so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability." *In re Commitment of Curiel*, 227 Wis. 2d 389, 415, 597 N.W.2d 697 (1999).

The statute is also not void for vagueness because it is unreasonable to suggest that an ordinary person, intent on obeying the law, would not know that using a cell phone with the intent to commit a child sex crime is impermissible. *See State v. Jensen*, 2004 WI App 89, ¶30, 272 Wis. 2d 707, 681 N.W. 2d 230. And yet this is what McKellips suggests.[21] The fact that the State and the court may have misunderstood that the question should have been more aptly phrased as whether the telephone was used to *access* the computerized communication

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curiam opinions issued may be cited in extremely limited circumstances. McKellips does not invoke one of these circumstances here.

[20] McKellips's Br. at 28.

[21] McKellips's Br. at 30.

system – and not whether the phone was the system itself – has no import on whether the statute is unconstitutionally vague.

Statutes are presumed constitutional. *State v. Smith*, 2010 WI 16, ¶8, 323 Wis. 2d 377, 780 N.W.2d 90. It is McKellips's burden to overcome that presumption beyond a reasonable doubt. *State v. Cole*, 2003 WI 112, ¶11, 264 Wis. 2d 520, 665 N.W. 2d 328. Instead of showing how the statute is unconstitutional, McKellips instead focuses on how his actions were not nefarious.[22] That may have been relevant to his defense at trial, but it has no bearing on the constitutionality of the statute.

IV. Harmless error review applies.

This Court asked the parties to address whether the jury instruction at issue was incorrect and, if so, whether the error was harmless. In addition, the Court asked whether, as a matter of law, a new trial in the interest of justice can 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. In response, McKellips argues that harmless error review does not apply to his case because the court of appeals reversed his judgment based on its finding that the interest of justice requires that he receive a new trial.[23] This argument is circular. In response, the State rests on its argument in its brief-in-chief.

V. Any error in the jury instruction was harmless.

McKellips argues that the asserted error in the jury instruction was not harmless because (1) this Court must

[22] McKellips's Br. at 32.

[23] McKellips's Br. at 33.

determine whether he used a computerized communication system and he will not "re-hash" that argument in this section of his brief; and (2) the State failed to prove McKellips's intent with CH was sexual in nature.[24] McKellips's arguments are surprising.

The question of whether the instruction was harmless turns on whether the State proved 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). The State has shown that it is clear that a rational jury, hearing the same evidence, would have found McKellips guilty of violating Wis. Stat. § 948.075(1r) absent the extraneous instruction provided by the court. This is so because it is inconceivable that the jury could have been so confused by the circuit court's instruction that it was somehow misled and would not have found McKellips just as guilty absent the extra information.

In addition, the question of McKellips's intent is not properly before this Court.[25] The court of appeals reversed McKellips's conviction because it concluded that the jury instruction relating to "computer" and "computerized communication system" may have confused the jury, not because the evidence was insufficient to find that McKellips intended to sexually assault CH.

[24] McKellips's Br. at 34-35.

[25] McKellips's Br. at 35-38.

VI. McKellips's suggestion that when courts reverse a conviction based on the interest of justice they need not determine whether the case is exceptional (unless the case concerns new evidence) is without merit.

McKellips advances an unusual theory: a court need not determine whether a case is exceptional before reversing a criminal conviction in the interest of justice unless the case concerns newly discovered evidence.[26] For this position, McKellips cites *State v. Avery*, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W. 2d 60.

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, this Court stated that a court need not use the word "exceptional," but the court "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.

McKellips argues that the State seeks to "[e]xtend[]" *Avery* because, in McKellips's view, *Avery*'s holding is limited solely to cases on collateral review and to cases that involve newly discovered evidence.[27] McKellips is mistaken. Although McKellips is correct about the posture of *Avery* and that it concerned new evidence, there is nothing about *Avery* that so limited its instruction on reversals in the interest of justice. It remains true that a court must engage in at least some analysis, or give the parties some explanation, of what it is about a case

[26] McKellips's Br. at 38.

[27] McKellips's Br. at 40.

that warrants the extreme remedy of the reversal of a criminal conviction without any harmless error scrutiny. *See id.* There is no reasonable rationale for McKellips's constrained view of *Avery*.

VII. The court of appeals failed to explain how McKellips's case is exceptional.

After arguing that the court of appeals need not explain why the case at hand is exceptional enough to warrant such a serious remedy, McKellips argues that the court of appeals engaged in the proper analysis.[28] In support of this argument, McKellips points to the court of appeals' citation of *State v. Hicks*, 202 Wis. 2d 150, 163, 549 N.W. 2d 435 (1996).[29] The State agrees that the court of appeals cited *Hicks*,[30] but that bare invocation falls short of the analysis required under *Avery*. The *Avery* analysis need not be complex, but the court must provide some explanation why the error is not subject to harmless error review. The court of appeals' decision lacks this component.

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[28] McKellips's Br. at 40-42.

[29] McKellips's Br. at 41.

[30] *State v. McKellips*, 2015 WI App 311, ¶19, 361 Wis. 2d 773, 864 N.W.2d 106.

CONCLUSION

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

Dated this 16th day of March, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,995 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 16th day of March, 2016.

_____
Katherine D. Lloyd
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