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STATE OF WISCONSIN
COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2017AP1536 CR

SHAYD C. MITCHELL,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION AND
ORDER DENYING POST CONVICTION MOTION ORDERED AND
ENTERED IN MARATHON COUNTY CIRCUIT COURT, THE HONORABLE
GREGORY E. GRAU AND GREGORY J. STRASSER PRESIDING

DEFENDANT-APPELLANT'S REPLY BRIEF

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ISSUE PRESENTED

WAS THE EVIDENCE SUFFICIENT FOR THE JURY TO FIND
BEYOND A REASONABLE DOUBT THAT MITCHELL COMMITTED THE
OFFENSE OF CHILD ENTICEMENT?

The trial court answered this question in the affirmative.

ARGUMENT

THE EVIDENCE WAS INSUFFICIENT FOR THE JURY TO FIND
BEYOND A REASONABLE DOUBT THAT MITCHELL WAS GUILTY OF
CHILD ENTICEMENT CONTRARY TO SEC. 948.07(1), WIS. STATS.

The parties agree that the standard of review from *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990) applies (pages 5-6 of State's brief).

In this case, the text messages indicated clearly that Family Video was not intended to be the location where sexual contact was supposed to take place:

ibox	6085206739	Meet up. Go to my place. And have sum fun.
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Exhibit 2: Page 1.

However, Mitchell indicated that they could hang out for a while after Zager asked if they if they were going to go to Mitchell's place (Exhibit 2, page 2, portions reproduced below).

ox	6085206739		Just tell him ur going to see a friend. We can meet a family video on sixth.	9/21/2013
ox	6085206739		And how would u ge back? We can hang out for a while. Doesnt matter to me.	9/21/2013
tbox	6085206739		I just talked to him and i told him not to ask any questions	9/21/2013
tbox	6085206739		He said he could give me a ride	9/21/2013
ox	6085206739		Um okay. Could have just told him u were going to see a friend.	9/21/2013
ox	6085206739		We can meet at Family Video on sixth.	9/21/2013
tbox	6085206739		Ok hes used that one on me a couple times so i said it back to him	9/21/2013
ox	6085206739		Haha. So we gunna meet at family video?	9/21/2013
tbox	6085206739		So how long do u think ill be there	9/21/2013
ox	6085206739		(1/2) It takes me ten min to get there. But i wanna get ready first. Just txt me wen u r an ur way. I will be on my way there too. I will be wearing a red	9/21/2013
ox	6085206739		(2/2) chicago bulls fitted hat.	9/21/2013
tbox	6085206739		Ok do u want to meet right by the door then	9/21/2013
ox	6085206739		No. Inside u will see me. Discreet as possible.	9/21/2013
afts	6085206739		So we gonna	9/21/2013
tbox	6085206739		Im on my way	9/21/2013
tbox	6085206739		U there	9/21/2013
ox	6085206739		Me too. Leaving now.	9/21/2013
tbox	6085206739		Ok we gonna go back by ur place or what	9/21/2013
ox	6085206739		Ya. im not far from there	9/21/2013

Mitchell was arrested while walking approximately two blocks from Family Video (92: 89-90). The court can take judicial notice that Family Video is a store that rents videos. It is open to the public. The State presented no evidence that Family Video was a secluded place (although it is a building). It is clear that although Mitchell may have wanted to meet up with the child there, it was not the place where Mitchell intended to have sexual contact or intercourse. Nor can the State rely upon the theory set forth in its brief that a plan to meet at Family Video was sufficient to find an intent to cause Zager to enter Mitchell's residence for the

purpose of sexual activity (p. 6 of State's brief). This meeting at a public place did not demonstrate "unequivocally under all of the circumstances" that Mitchell had formed the intent and would have committed the crime except for the intervention of another person or some extraneous factor." *Wis JI-Criminal 2134B* . The purpose of the meeting at Family Video was for Mitchell to make a final evaluation of Zager to see if Zager was someone that Mitchell wanted to invite into his residence. In his Craigslist ad, Mitchell had set forth some specific criteria for a sexual partner. Had Mitchell "unequivocally under all of the circumstances" decided to engage in sexual activity with Zager, he would have arranged a meeting place closer to his residence.

As noted by Mitchell in his brief-in-chief (pages 7-8) and by the State (pages 10-11 of State's brief) a number of Wisconsin cases have explored the issue of what specific intent is required for a violation of Sec. 948.07(1), Wis. Stats. The facts of this case are distinguishable from *State v. Robins*, 2002 WI 65, 253 Wis. 2d 298, 646 N.W.2d 287 and *State v. Grimm*, 2002 WI App 242, 258 Wis.2d 166, 653 N.W.2d 284 34 because Mitchell deliberately established a place for him to meet Zager where he could evaluate him (at a distance if necessary) to determine if he met the physical and other criteria Mitchell set for a sex partner. Such an evaluation was important because Mitchell could not determine the truthfulness or accuracy of the information provided by Zager in the texts without a physical view of Zager. This final evaluation was an important factor in

Mitchell making a final decision to take Zager to his residence for the purpose of sexual activity. Until the final evaluation occurred, there was not an unequivocal intent to commit a crime.

There was evidence sufficient to convict Mitchell of using a computer to facilitate a child sex crime contrary to Sec. 948.075(1r), Wis. Stats. which does not include an element of attempting or causing a child to go into a place.

However, a physical meeting and discussion with Mitchell and Zager was needed before Mitchell made a decision to go to Mitchell's apartment for illicit sexual activity. While courts rarely reverse a jury's verdict, the facts and lack of facts of this case justify it. The State did not present facts sufficient for a rational jury to find beyond a reasonable doubt that Mitchell committed the offense of child enticement the State charged him with in this case.

No reasonable jury could find that Mitchell had the required intent to engage in sexual activity with Zager in a building as required for a conviction under Sec. 948.07, Wis. Stats. Mitchell's conviction on that count must be reversed.

CONCLUSION

For the reasons stated above and in his brief-in-chief, the undersigned attorney requests that this court reverse the trial court's Judgment of Conviction and Order Denying Post-Conviction Motion and remand this matter to the trial court with instructions to vacate the conviction.

Dated this 1st day of December 2017

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CERTIFICATION AS TO BRIEF LENGTH

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief and appendix produced with a serif proportional font. This brief has 1011 words, including certifications.

Dated this 1st day of December 2017

LEN KACHINSKY

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies the requirements of 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 1st day of December 2017

LEN KACHINSKY