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COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT II

Case Nos.: 2020AP001127-CR
2020AP001128-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DALLAS R. CHRISTEL,

Defendant-Appellant.

Appeal of a Appeal of a Judgment and Orders
Entered in the Calumet County Circuit Court,
the Honorable Jeffrey S. Froehlich, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

ISSUES PRESENTED

1. Did Dallas R. Christel's postconviction motion present a new factor that warranted modification of his sentence?

The circuit court found it was not a new factor. This court should reverse and remand for a determination of whether this new factor warrants modification.

2. Is Wis. Stat. § 940.235 facially unconstitutional?

The circuit court answered no. This court should reverse.

3. Is Wis. Stat. § 940.235 unconstitutional as applied to Mr. Christel?

The circuit court answered no. This court should reverse.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Christel does not request oral argument on either issue, unless the court has unanswered questions after briefing that necessitates additional argument. Mr. Christel does not request publication on the issue of a new factor, as it involves an application of facts to existing law. Mr. Christel does request publication on the issue of constitutionality,

as there is a lack of any case law on the issue in Wisconsin.

STATEMENT OF THE CASE

On September 6, 2017, the state filed a criminal complaint charging Dallas R. Christel with two counts of battery, domestic abuse, as a repeater; one count of second-degree sexual assault, domestic abuse, as a repeater; one count of strangulation, domestic abuse, as a repeater; and one count of disorderly conduct, domestic abuse, as a repeater, in Calumet County, Case No. 17-CF-179. (R1.4).[1]

On March 8, 2018, Mr. Christel was charged with two counts of felony bail jumping in Calumet County, Case No. 18-CF-39. (R2.1). The violations arose from Mr. Christel's failure to appear at the jury trial and violation of an absolute sobriety condition in his bond for case 17-CF-179. (R2.1). Ultimately, Mr. Christel was arrested in the state of Oregon and extradited back to Wisconsin to face charges in both cases.

Regarding case number 18-CF-39, Mr. Christel pled guilty to two counts of felony bail jumping on February 18, 2019. (*See generally* R2.57). He was sentenced on April 29, 2019, where the court, the Honorable Jeffrey S. Froehlich presiding, sentenced

[1] In this brief, "R1" refers to the appeal record in No. 2020AP001127-CR and "R2" refers to the appeal record in No. 2020AP001128-CR.

Mr. Christel to a total of 12 years in the Wisconsin State Prison system, comprised of 3 years of initial confinement followed by 3 years of extended supervisions on both counts, to be served consecutive to each other. (R2. 33). During sentencing, the court found Mr. Christel eligible for the Substance Abuse Program (SAP) based on a concern for Mr. Christel's substance abuse needs. (R2.59: 21).

The case in 17-CF-179 proceeded to trial on March 27, 2019. On the day of trial, defense counsel filed a motion challenging the constitutionality of count 3, strangulation and suffocation. (R1.247:7; 117; App. 111). The court did not address the motion, as it was deemed untimely. (R1.247: 9, 31-32; 129; App. 113-115). On March 29, 2019, following the trial, Mr. Christel was found guilty on all five counts. (R1.249:148-151). The court ordered a PSI and set the case for sentencing. (R1.170). In the interim, defense counsel renewed her motion for dismissal of count 3. (R1.180, 181, 192). The parties briefed the issue and the court denied the motion in writing prior to sentencing. (R1.199; App. 104-109).

On August 9, 2019, the court, the Honorable Jeffrey S. Froehlich presiding, sentenced Mr. Christel to a total of 22 years in the Wisconsin State Prison system comprised of 13 years and 6 months of initial confinement followed by 8 years and 6 months of extended supervision, consecutive to any other sentence. (R1.211; *see generally* R1.250). This sentence must also be served consecutively to the sentence imposed for the bail jumping. (R1.211*)*.

During the 17-CF-179 sentencing hearing, the court acknowledged Mr. Christel's alcohol and other drug abuse issues and indicated that he would need to address these issues while incarcerated. (R1.250: 31, 38). However, the court did not refer to the effect the sentence here may have on Mr. Christel's ability to participate in SAP, as ordered in 18-CF-39. (*See generally* R1.250).

Post sentencing, Mr. Christel was staffed in prison, at which time he was informed, as a result of the order of his sentences, he was not eligible for the Substance Abuse Program. (R1.224; R2.44). Despite the court's order in 18-CF-39, Mr. Christel is ineligible for SAP on his bail jumping sentence because he is statutorily ineligible for SAP in 17-CF-179, given the order of the sentences.

Mr. Christel filed a postconviction motion requesting that the court modify his sentence based on a new factor. (R1.224; R2.44). Specifically, Mr. Christel alleged that the sentence in 17-CF-179, for which Mr. Christel was sentenced second, was a new factor. Christel alleged that he had treatment needs that were acknowledged in 18-CF-39, but, because of statutory ineligibility for treatment in 17-CF-179, he was unable to complete the treatment deemed appropriate by the judge. After briefing, the court denied the defendant's motion for sentence modification. (R1.224; R2.44). Mr. Christel filed timely Notices of Appeal. (R1.232; R2.51). This court consolidated the cases on appeal.

STATEMENT OF THE FACTS

The charges in this case stem from Mr. Christel's brief but serious romantic relationship with E.M. in 2017. During her testimony, E.M. told the jury that she knew Mr. Christel from years back in school, and when they reconnected, she went to stay with him in March 2017 in order to get on her feet after separating from her husband. (R1.248:21). After a few months living together, they ultimately started a romantic relationship. On May 7, 2017, they were out together and decided to stop at Schwarz's, a supper club in St. Ann's, Wisconsin, for a drink with friends. (R1.248:25). After a few drinks, they left Schwarz's, and E.M. told the jury that Mr. Christel seemed very intoxicated. (R1.248: 27).

While E.M. did not remember doing so, Robbie Pratt testified that he remembered Mr. Christel and E.M. stopping at his house that evening, and also noticed that Mr. Christel was intoxicated, but that he did not seem angry. (R1.248:115, 214).

E.M. and Mr. Christel testified to very different accounts of what happened when they arrived home.[2] E.M. testified that when they arrived back to the apartment, a fight that started in the car continued

[2] E.M. admitted she didn't know the chronology of events and provided testimony consistent with a lack of memory regarding chronology, but for the purposes of appeal, Mr. Christel has given her testimony context such that the court is able to follow the chronology of events. (R1.248:32-33).

and Mr. Christel began to throw things. (R1.248: 29-31). She testified that Mr. Christel hit her with a chair, and took off her clothes. (R1.248: 31). After Mr. Christel took off her clothes, E.M. said she ran outside to get help, to the gas station down the street where she knew police to typically have a squad car parked, but on that night, there was no police car. (R1.248:31-32). E.M. said she was running and calling for help, but Mr. Christel grabbed her and pulled her back into the apartment. (R1.248:34). No officer checked E.M.'s story to see if an officer was at the aforementioned intersection on the 7th at the time she indicated she ran for help. (R1.248:181).

E.M. told the jury that, after being dragged back to the house, she remembered being on the bed, Mr. Christel screaming at her, holding her hands behind her head, and raping her. (R1.248:35). She explained that Mr. Christel had his hands above her head. (R1.248:35-36). E.M. testified that Mr. Christel's hand went up by her neck, and at some point he was grabbing at her lips and pushing up on her neck. (R1.248:36).

During the incident, E.M. testified that she texted her estranged husband, S.M.[3], and asked for help. (R1.248:41). S.M drove to Mr. Christel's apartment, at which point E.M. said she broke free and ran outside, with only a coat to cover her. (R1.247:185). Both S.M. and E.M. testified that they

[3] To preserve the anonymity of E.M., this brief refers to her estranged husband as S.M.

didn't call police or go to a hospital. (R1.247: 115, 118-19; 248:43). They did, however, tell the jury that a few days later, on May 10, 2017, they took pictures of E.M.'s apparent injuries. (R1.247: 190; R1.248:47). The pictures, which showed no injuries to E.M.'s neck but did show a mark on her lip, were made part of the record and published to the jury. (R1.247:198; R1.248:50-51, 65).

E.M. testified that after this incident, she continued contact with Mr. Christel and, after a few weeks, ultimately reconciled with him because she wanted to make everything better. (R1.248:64-65). E.M. testified about a second incident that took place on May 27, 2017. The account of what happened that night also differs between Mr. Christel and E.M.[4]

Briefly, E.M. testified that on May 27, 2017, she and Mr. Christel went to S.M.'s house to crush cans and spend time with E.M.'s children. (R1.248:65). E.M. told the jury that there was an argument, during which Mr. Christel asked her to hit him, so she did. (R1.248:68-69). Shortly after, they left to go home. (R1.248:68-69).

E.M. testified that when they arrived home, Mr. Christel ripped off her clothes, hit her on the back with drawers, pulled her hair, kicked her down the stairs, threw her stuff outside, and locked her out

[4] For the purposes of appeal, the facts of the incident on May 27, 2020, are not relevant to the constitutional claim, as count 3, strangulation and suffocation, pertain to the events on May 7, 2020.

of the house. (R1.248: 72-73, 78). She told the jury her attempts to deploy pepper spray were ineffective in stopping Mr. Christel. Instead, he took hold of the spray and deployed it at her. (R1.248:74).

Police arrived at the residence shortly after 10:00 p.m. (R1.248:150). During the investigation at the apartment, E.M. did not disclose the incident from May 7, 2017. (R1.248:90). It was not until May 31, 2017, did E.M. tell the police about her version of events regarding both May 7 and May 27. (R1.248:99). Only in her May 31 statement did E.M. indicate that the incidents were intentional, not accidental. (R1.248:102). E.M. never went to the hospital and never had a sexual assault exam completed. (R1.247:167-168; R1.248:167-69).

Mr. Christel also testified. As to the events of May 7, 2017, he told the jury that he remembered stopping at Schwarz's and having drinks, but believed he was drugged because he did not remember anything else until he and E.M. returned home. (R1.248:243; R1.249:46-47). Mr. Christel told the jury that the next thing he remembered he was lying in bed and E.M. was initiating sex and erotic asphyxiation with him. (R1.248:243). When they were done having sex, he went to the bathroom and returned to an angry E.M. yelling at him, and throwing a chair and a star tea light at him. (R1.248:244-45). Mr. Christel testified that he kicked the chair back at her and hit her, and that he threw the tea light on the ground after she had thrown it at him. (R1.248:245-46). He said that E.M. was still

throwing things, so he went in his bedroom and locked the door. (R1.248:246-47). When he woke up, E.M. was gone. He told the jury that he did not try to contact her right away, as he had broken up with her and kicked her out of the house. (R1.249:49). Mr. Christel also told the jury that he did eventually apologize for hurting E.M.; he had promised her he would never kick her out of his house, but felt as if he had broken that promise and he felt bad for kicking the chair that hit E.M. (R1.248:248; R1.249:32).

Mr. Christel also testified about the incident on May 27. He told the jury that while at S.M.'s house, E.M. became upset with him and hit him, unprovoked. (R1.248:251-52). When they returned home, the arguing continued, and E.M. threw a bowl towards Mr. Christel, which prompted him to tell her to leave and throw her belongings down the steps. But, she continued to throw things around the apartment instead of leaving. (R1.248:253-54; R1.249: 16, 31). After a tug of war over her bag that resulted in E.M.'s purse breaking, E.M. picked up the pepper spray and used it on Mr. Christel. (R1.248: 264-65). Mr. Christel said after this he left the apartment and went to Kwik Trip for cigarettes. (R1.249: 17, 582). Police never tried to corroborate Mr. Christel's version of events about Kwik Trip with surveillance video, although it was available. (R1.247:179).

When he returned, Mr. Christel testified that he found E.M. naked in the bathroom. (R1.249:19). Sometime after, police arrived and found Mr. Christel

outside of the apartment and E.M. naked at the top of the apartment stairs. (R1.248:146).

Both Mr. Christel and E.M. were arrested, as police were unable to determine exactly what happened and who was at fault. (R1.248: 154-55). During the investigation, police also took a statement from the apartment's downstairs tenant, Kent Anderson. He testified at trial that he heard arguing from Mr. Christel's apartment the night of May 7. (R1.247:155-56). Mr. Anderson told the jury that, the next day, Mr. Christel apologized to him via text, saying that he was sorry, it would not happen again, and he had kicked E.M. out. (R1.247:157). Mr. Anderson testified that on May 27, he heard Mr. Christel "yelling at her to get the fuck out of my house," to which he heard the woman answer "no." (R1.247:158).

During her testimony, E.M. admitted that she had previously discussed BDSM[5] relationships with Mr. Christel. (R1.248:122). Heidi Buss, E.M.'s coworker, also testified that she had conversations with E.M. in which E.M. talked about her relationship with Mr. Christel—that she liked it when he got rough with her or made her feel helpless by holding her down. (R1.248:218-19). Mr. Christel testified that E.M. told him she liked bondage, erotic

[5] BDSM is defined as: sexual preferences and behaviors involving physical restraints, an unequal power relationship, or pain, including the practice of bondage, discipline, dominance, submission, sadomasochism, etc. http://www.dictionary.com (last visited Sep. 17, 2020).

asphyxiation and roll playing. (R1.248:238). Mr. Christel told the jury that they had a 'safe word' or signal, which was three taps, at which point Mr. Christel would let go during erotic asphyxiation. (R1.248:239).

Defense counsel also presented testimony, consistent with defense counsel's theory that S.M., E.M.'s estranged husband, could have caused the injuries to E.M. on May 7. Travis Enneper, a friend of Mr. Christel, testified that, sometime in March 2017, they went to pick up E.M. from her estranged husband's house. (R1.:248:197). He testified that as they pulled up to the house, S.M. came towards the truck and slapped the hood two or three times. (R1.248:198). Mr. Enneper told the jury that his window was open and S.M. came to the window, stood on the floorboard, and grabbed the window. (R1.248:198). He said that he opened the door to avoid his window breaking and S.M., whom he had never met before, grabbed, pushed and shoved him. (R1.248:198-99). Robbie Pratt also testified to this event, confirming for the jury that he witnessed S.M. slam his hands on the front of the vehicle and pull on the window. (R1.248:212-13).

At the close of evidence, the court instructed the jury, took closing arguments, and ultimately the jury came back with guilty verdicts on all five counts. (R1.249:14). Additional relevant facts will be discussed below.

ARGUMENT

I. The trial court erred in denying the defendant's postconviction motion without making the proper legal determinations.

Whether a new factor exists presents a question of law that this Court reviews independently. *State v. Scaccio,* 2000 WI App 265, ¶13, 240 Wis. 2d 95, 622 N.W.2d 449. Even if proved, the circuit court maintains discretion to decide whether the new factor justifies sentence modification. *State v. Harbor*, 2011 WI 28, ¶37, 333 Wis. 2d 53, 797 N.W.2d 828. The appellate court reviews that decision for an erroneous exercise of discretion. *Id*., ¶33.

A defendant seeking a sentence modification must demonstrate, by clear and convincing evidence, that there is a new factor to justify the modification. *State v. Franklin*, 148 Wis. 2d 1, 8-9, 434 N.W.2d 609 (1989). A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." *Id*. at 8 (citation omitted). If the defendant meets that standard, the circuit court must then determine, in its discretion, whether the new factor justifies sentence modification. *Id*. "[T]he defendant must

demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence." *Harbor*, 333 Wis. 2d 53, ¶38.

Whether a fact or set of facts presented by the defendant constitutes a "new factor" is a question of law. *Id.,* ¶33, citing *State v. Hegwood*, 113 Wis. 2d 544, 547, 335 N.W.2d 399 (1983). Additionally, this court reviews questions of law independently of the determinations rendered by the circuit court and the court of appeals. *Hegwood*, 113 Wis. 2d at 546. The determination of whether a new factor warrants sentence modification is reviewed for erroneous exercise of discretion. *Id.*

In his postconviction motion, Mr. Christel argued that the sentence in 17-CF-179 was a new factor, as it did not exist at the time of sentencing in 18-CF-39. (R1:224, 227; R2:44, 46). Alternatively, he argued that the information regarding how the sentence in 17-CF-179 would impact his eligibility for SAP in 18-CF-39 was unknowingly overlooked at the time of sentencing in 18-CF-39, given his consecutive sentence and ineligibility for programming in 17-CF-179 made him ineligible for programming on both cases. (R1:224, 227; R2:49).

Here, all but one of Mr. Christel's convictions in 17-CF-179 is a Chapter 940 offense, and he is therefore ineligible to participate in the program at all on these cases. *See* Wis. Stat. § 302.05(3)(a) (an inmate is statutorily ineligible for SAP if serving a sentence for Chapter 940 conviction). However, he is

statutorily eligible in 18-CF-39 to participate in SAP. (Bail jumping is not a disqualifying offense).

After briefing, the circuit court issued a written decision denying Mr. Christel's postconviction motion. (R1.230; R2.49; App. 101-103). The court only ruled on the first prong of *Harbor,* determining that the sentence in 17-CF-179 was not a new factor, and stopped there. (*See generally* R1:230; R2:49; App. 101-103). Not only did the court err in deciding that the sentence in 17-CF-179 was not a new factor, but the court failed to complete the required *Harbor* analysis when it failed to address whether, if the sentence in 17-CF-179 was a new factor, it would warrant modification.

A. The court erred in determining that the sentence in 17-CF-179 was not a new factor.

The court's written decision stated that the sentence in 17-CF-179 was not a new factor because the court was aware that both cases were pending at the time of sentencing in 18-CF-39. (R1.230:3; R2.49:3, App. 103).

The court's ruling was erroneous. The sentence in 17-CF-179 is, in fact, a new factor, as it was not in existence at the time of sentencing in 18-CF-39. While the court was aware, given the state's comments at sentencing in 18-CF-39, of what *could* happen at sentencing in 17-CF-179, there is no way for the court to have known how a sentence, one that wasn't even in existence at the time, would affect another sentence, unless the court had prematurely

and prejudicially determined what sentence it would give on the subsequent case.

This court should find that the new sentence in 17-CF-179 is a new factor, either because it was not in existence at the time of sentencing in 18-CF-39 or because the court's contemplation of another sentence unknowingly overlooked the actual effect the sentence in 17-CF-179 would have on the court's sentence in 18-CF-39.

B. The court failed to determine, even if the sentence in 17-CF-179 was a new factor, whether it warranted sentence modification.

The court completely failed to address the second prong of the test in *Harbor*. (*See generally* R1.230; R2.49; App. 101-103). This court should find that Mr. Christel has met his burden to demonstrate that the sentence in 17-CF-179 is a new factor, and remand to the circuit court with directions to address whether this new factor warrants modification.

II. Count 3, strangulation and suffocation, as defined in Wis. Stat. § 940.235, is unconstitutional facially and as applied to Mr. Christel.

Wisconsin Statute § 940.235 makes it a crime for "[w]hoever intentionally impedes the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person." (Wisconsin Statutes 2017-2018). The statute does not contain an element

regarding consent, nor does the statute require that the defendant intend to cause any sort of bodily harm while impeding breathing.

Failure of the statute to contemplate private relationships with consenting adults renders the statute unconstitutional. This court should determine as much and vacate the judgment of conviction on count 3, strangulation and suffocation.

A. Standard of review.

"The constitutionality of a statute is a question of law which this court may review without deference to the lower court." *State v. McManus*, 152 Wis. 2d 113, 129, 447 N.W.2d 654, 660 (1989). Statutes are presumed to be constitutional and will be upheld unless the party challenging the statute shows that the statute is unconstitutional beyond a reasonable doubt. *Id.*

Even as-applied constitutional challenges require the challenger to overcome the presumption of a statute's constitutionality and prove the statute is unconstitutional beyond a reasonable doubt. *State v. Wood*, 2010 WI 17, ¶15, 323 Wis. 2d 321, 780 N.W.2d 63.

B. Wisconsin Statute § 940.235 is facially unconstitutional, as it infringes on fundamental rights.

1. Wisconsin Statute § 940.235 implicates fundamental rights to private, intimate associations and bodily integrity.

Generally, a governmental action cannot infringe on the fundamental rights of its citizens: "[t]heir right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Decisions by married and unmarried partners regarding the intimacies of their physical relationship "are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 578, *citing Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) (footnotes and citations omitted).

Here, the statute unconstitutionally enters the private bedroom of adults and infringes on an individuals' fundamental right to engage in consensual, sexual, non-injurious behaviors. It unreasonably restricts the conduct of consenting adults by making private sexual choices a crime.

It is obvious that the state has an interest in prosecuting and preventing mal-intended or harmful sexual encounters. However, the statute cannot be so overbroad or vague that it illegally infringes on the

rights of individuals engaged in consensual conduct that does not result in injury. The statute here fails to parse out the difference and instead, punishes the decisions of consenting partners without an element of consent or intent to harm.

2. Wisconsin Statute § 940.235 is overbroad.

"A statute is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to conduct which the statute is not permitted to regulate." *State v. Johnson*, 108 Wis. 2d 703, 708, 324 N.W.2d 447 (Ct. App. 1982), *citing City of Milwaukee v. Wilson*, 96 Wis. 2d 11, 19, 291 N.W.2d 452 (1980). The overbreadth doctrine is based on the requirement of substantive due process and has the effect of preventing the limiting, by indirection, of constitutional rights. *State v. Tronca,* 84 Wis. 2d 68, 86, 267 N.W.2d 216 (1978), citing *State v. Driscoll*, 53 Wis. 2d 699, 193 N.W.2d 851 (1972).

While most often applied in the context of the First Amendment, the Supreme Court has also applied the overbreadth doctrine to rights falling outside the scope of the First Amendment, where fundamental rights are implicated. *See Aptheker v. Secretary of State,* 378 U.S. 500 (1964) (travel); *Louisiana v. United States*, 380 U.S. 145 (1965) (voting); *Berger* v. *United States,* 388 U.S. 41 (1967) (privacy against government eavesdropping); *Griswold v. Connecticut,* 381 U.S. 479 (1965) (use of

contraceptives); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986) and *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1982) (abortion rights).

Wisconsin Statute § 940.235 is unconstitutionally overbroad, as it is so sweeping that it regulates conduct that is not illegal and is otherwise protected liberty interest—private sexual relationships, including erotic asphyxiation. Failure of the statute to require non-consent improperly broadens the scope of the statute. *State v. Neumann,* 179 Wis. 2d 687, 711, 508 N.W.2d 54, 63 (Ct. App.1993).

Additionally, the intent element of the crime in Wis. Stat. § 940.235 does not cure the statute from being unconstitutionally overbroad. The statute does not require that the defendant intend to cause any harm, just that the defendant intended to impede breathing. Impeding breathing is all but required during erotic asphyxiation, requiring a person to intend to impede the breathing during such an act, even though consensual.

The statute goes far beyond even the type of conduct that *Lawrence* left open for state regulation—cases where persons might be injured or coerced. *Lawrence,* 539 U.S. at 578. The statute here does not account at all for consensual behavior that involves no injury, nor does it account for general

instances where breathing is impeded without injury. For example, a person would theoretically be guilty of strangulation and suffocation where one covers the mouth of another, even just for a moment, and causes no injury or harm.

Because the statute is so sweeping as to infringe on the fundamental right for consenting couples to participate in erotic asphyxiation, the statute is unconstitutionally broad. As such, count 3 should be dismissed.

3. Wisconsin Statute § 940.235 is unconstitutionally vague.

A statute is unconstitutionally vague if it "either fails to afford proper notice of the prohibited conduct or fails to provide an objective standard for enforcement." *State v. Thomas*, 2004 WI App 115, ¶14, 274 Wis. 2d 513, 683 N.W.2d 497. The underlying basis for a vagueness challenge to a statute is the procedural due process requirement of fair notice. *Thomas, citing State v. Ehlenfeldt*, 94 Wis. 2d 347, 355, 288 N.W.2d 786 (1980).

The question the court must answer in assessing a challenge for vagueness is as follows:

> …Is the statute read as a whole so indefinite and vague that an ordinary person could not be cognizant of and alerted to the type of conduct, either active or passive, that is prohibited by the statute?

State v. Courtney, 74 Wis. 2d 705, 709, 247 N.W.2d 714, 719 (1976), *citing State v. Woodington,* 31 Wis. 2d 151, 181, 142 N.W.2d 810, 143 N.W.2d 753 (1966).

Wisconsin Statute § 940.235 is unconstitutionally vague because it infringes on fundamental rights to private sexual choices. Specifically, Wis. Stat. § 940.235 is not sufficiently definite as to provide notice to a person of ordinary intelligence such that they need not "guess as to its meaning and differ as to its applicability." *City of Milwaukee v. Wilson*, 96 Wis. 2d 11, 291 N.W.2d 452 (1980). Without an element of consent, a person such as Mr. Christel could be engaged in and convicted of behavior that he did not know was illegal. While ignorance of the law is not a defense, sufficient notice of what crime one is committing is constitutionally required and is missing from the statute.

As with overbreadth challenge *supra*, the intent element doesn't cure the vagueness of the statute. That's because the intent of erotic asphyxiation is to block the airway in order to increase pleasure during a sexual encounter. This is why an element of consent is so important in the case of strangulation and suffocation cases, in order to distinguish between the serious, dangerous, domestic violence associated with non-consensual strangulation/suffocation and consensual erotic asphyxiation.

The statute does not properly give notice to a person what behavior is illegal or how the statute applies during a private experience with a consensual partner. Because the statute is vague, it is unconstitutionally invalid and this court should vacate the conviction for strangulation and suffocation.

III. Wisconsin Statute § 940.235 is unconstitutional as applied to Dallas R. Christel.

In an as-applied challenge to a statute, the challenger must establish that "a statute is unconstitutional on the facts of a particular case or to a particular party." *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶44 n.9, 309 Wis. 2d 365, 749 N.W.2d 211. The consequences of a successful as-applied challenge are limited to the challenger and similarly-situated parties. "[W]hen a court holds a statute unconstitutional as applied to particular facts, the state may [continue to] enforce the statute in different circumstances." *Id*.

The statute is unconstitutional as applied to Mr. Christel given the facts of this case. The jury heard testimony regarding consent: E.M. herself testified that she had conversations with Mr. Christel about BDSM, E.M.'s coworker testified that she had prior conversations with E.M. about how she liked it when Mr. Christel held her down and made her feel helpless, and Mr. Christel testified that E.M. expressed an interest in BDSM and erotic

asphyxiation and practiced as much with E.M. on several occasions. (R1.248:122, 218-19, 238-39).

While the court acknowledged the evidence of consent, it failed to give an instruction that would have allowed the jury to acquit Mr. Christel if the jury found that the acts were consensual. Given the lack of ability for the jury to consider consent as a defense, Wis. Stat. § 940.235 was unconstitutional as applied to Mr. Christel.

A. Consent was an issue in this case.

Not only was consent an issue, but there were questions regarding who caused the injuries. The victim testified that she had discussed BDSM behaviors with the defendant during the course of their relationship. (R1:248:122). Additionally, there was testimony from a third-party regarding conversations E.M. had with her, in which they discussed the sexual preferences and practices between Mr. Christel and E.M. Mr. Christel testified that he had a signal with E.M. for when E.M. wanted to stop an episode of erotic asphyxiation. (R1.248:218-19).

The pictures presented to the jury were not only taken days after the alleged events, but the photographs from the first incident were not taken by police, instead by the victim's estranged husband. (R1.247: 190; R1.248:47). This was an estranged husband who, the jury heard, had aggressively started a fight with Mr. Christel's friend while picking up E.M. on at least one prior occasion.

(*See generally* R1.248:196-200, 212-14). Defense counsel also questioned the presence of injuries in the photos in front of the jury, to which the only response was that E.M. thought the pictures showed injuries. (R1.249:77-78)

B. Because consent was an issue, the statute was unconstitutional as applied to Mr. Christel.

While the court acknowledged that there was testimony regarding consent and did give an instruction to the jury regarding consent, it was a limited instruction. Wisconsin Jury Instruction 1200G was read during closing instructions:

> Evidence of prior sexual conduct between [E.M.] and the defendant has been introduced. If you find this conduct did occur, you should consider it only to determine whether or not [E.M.] and Dallas Christel engaged in consensual erotic asphyxiation. Do not consider it for any other purpose.

(R1.249:101; 169).

The instruction acknowledged the issue of consent, but did not allow the jury to consider consent as a defense to the crime charged—it was not a substantive instruction about whether the state had to prove non-consent or whether consent would be a complete defense to the charge. The court limited the jury's use of the testimony regarding consensual erotic asphyxiation only to whether Mr. Christel and E.M. engaged in consensual

behavior in the past. Even if the jury believed that these were consensual sexual experiences based on the testimony, the instruction as given would not allow them to find Mr. Christel not guilty.

The lack of any substantive instruction was also problematic considering the lack of physical evidence. The state offered pictures of the injuries that were not taken by any independent investigator, but, rather, the alleged victim's estranged husband. The state acknowledged that there was no medical evaluation ever completed in this case to corroborate E.M.'s version of events, nor was there any disclosure of the strangulation until three and a half weeks after the alleged incident. Given the lack of physical evidence and the conflicting testimony regarding consent, the statute, without a substantive instruction on consent, was unconstitutional.

In this case, failure to allow for the court to give a substantive instruction regarding consent resulted in an unconstitutional application of the statute as-applied to Mr. Christel's case, and therefore count three should be dismissed.

CONCLUSION

Mr. Christel asks this court, on the first issue presented, to find the existence of a new factor and remand to the court for a determination on whether the new factor warrants sentence modification. Additionally, Mr. Christel requests that this court find that Wis. Stat. § 940.235 is unconstitutional, facially or as applied to Mr. Christel, and dismiss count 3 accordingly.

Dated and filed by mail this 21st day of September, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,417 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 and filed by U.S. Mail this 21st day of September, 2020.

Signed:

KELSEY LOSHAW
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 one or more initials or other appropriate pseudonym or designation instead of full names of 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.

Dated and filed by U.S. Mail this 21st day of September, 2020.

Signed:

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APPENDIX

INDEX
TO
APPENDIX