

1 recall the testimony of Clint Beam, Judge, when they did
2 the Cellebrite, we have over 300 and -- I want to say he
3 said 380-something-odd text messages between the chatter
4 and the defendant in this case.

5 On his phone, they were able to locate two and those
6 two were placed into evidence. So he had deleted all of
7 these off of his phone. So as to that count, Judge,
8 there is more than sufficient evidence and we would ask
9 the Court to deny the defendant's motion for judgment of
10 acquittal.

11 THE COURT: Mr. Hayes, do you want to present some
12 argument?

13 MR. HAYES: Your Honor, I'll address those in
14 reverse order, if that's all right.

15 THE COURT: Sure.

16 MR. HAYES: Regarding Count III, there is evidence
17 in the record that during the -- that the video that was
18 shown by the State, that during the interview with
19 police, he attempted to show police where he had backed
20 up the texts online. He said specifically and
21 repeatedly, I have to show you a web browser. Police
22 then yanked the phone from his hand and said, we are not
23 playing games with you, Mr. Harvey.

24 He explicitly intended to show them where he had
25 archived them online. Under Costanzo v. State, if the

1 texts are available in another location, that does not,
2 as a matter of law, constitute tampering with evidence.

3 THE COURT: Well, I'll rule on Count III right now.
4 The motion for judgment of acquittal is denied. There's
5 more than sufficient evidence that he was concealing.
6 There was testimony from law enforcement that he was
7 attempting to remove things on the phone -- from his
8 phone. And then when they obtained his phone, those
9 things were not on his phone.

10 whether they were somewhere else or whether he
11 removed them somewhere else, well -- and whether or not
12 that was destroying or concealing, that's up to the jury
13 to decide. But there certainly is evidence from which
14 the jury could find that he, by his actions and by the
15 fact that they were not found on the phone, regardless of
16 whether they're found anywhere else, that he was
17 concealing them. And that's what the statute says,
18 conceal or remove the items.

19 And, therefore, on Count III, the motion for
20 judgment of acquittal is denied.

21 Do you want to present argument -- any argument on
22 one and two?

23 MR. HAYES: Yes, Your Honor, thank you. I have a
24 copy of the amended information.

25 THE COURT: I have the amended information right in

1 front of me.

2 MR. HAYES: And, Your Honor, I think the State
3 misses the argument a little bit that the facts support
4 some conviction of some crime under the statute. And
5 they're a little fast and loose with the elements as
6 actually alleged.

7 The argument is, or one of the arguments is, that as
8 alleged, he did some act that was unlawful under Chapter
9 794, 800, or 827. That was the reason that he knowingly
10 traveled was to violate one of those three statutes, plus
11 a catchall. After using a computer device, et cetera, to
12 lure or attempt, there is no recitation of Chapter 794,
13 800, or 827. They only charged him with traveling after
14 using a computer, quote, to engage in or to otherwise
15 engage in unlawful sexual conduct, in violation of
16 847.0135(4)(a).

17 Your Honor, the text of .0135(4)(a), or the clause
18 that they are sort of reciting in the chapter here, does
19 not include the language that the computer was used to
20 lure or solicit a person that was a child or believed by
21 the defendant to be a child. In fact, the language in
22 that clause only states at the end that the luring was
23 with a child.

24 Further, the fact that, otherwise engage in unlawful
25 sexual conduct, the fact that "otherwise" is included as

1 pleaded, and the only clause charged is other unlawful
2 sexual conduct, means that it cannot constitute a
3 violation of either Chapter 792, 800, or 827.

4 In other words, what would the word "otherwise" mean
5 in that context? If the violation has to be -- other
6 than, the violation has to have been something other than
7 some violation mentioned in the plethora of violations in
8 794, 800, and 827. It would be unconstitutionally vague
9 if it was applied in every case.

10 It's entirely because of the way that this is
11 pleaded that the State has failed to name an
12 underlying -- an underlying crime that he was using the
13 computer -- he was using the computer to solicit or lure
14 with. That means that Count I, as a matter of law,
15 fails.

16 There is no evidence of any violation of any statute
17 that constitutes otherwise unlawful sexual conduct. In
18 other words, there's plenty of sexual conduct defined in
19 794, 800, and 827. There are several statutes that
20 define it otherwise -- that define otherwise unlawful
21 sexual conduct. None of them are relevant at all here.

22 THE COURT: well, it says specifically to engage in
23 or to otherwise engage in. It's an or. So they're not
24 just dealing with to otherwise engage in. It's either to
25 engage in or to otherwise engage in.

1 MR. HAYES: Your Honor, the statute --

2 MR. HUTCHINS: And, Your Honor, this is just a
3 re-argument --

4 THE COURT: Hold on, hold on. I don't want to hear
5 it, Mr. Hutchins.

6 MR. HAYES: And, Your Honor, similar to that
7 argument is that we're traveling with the same defective
8 information.

9 But to engage in or to otherwise engage in, what
10 that clause is leading up to is other unlawful sexual
11 conduct. Other unlawful sexual conduct is in the
12 statute. And in the statute, it uses the phrase
13 "otherwise." In other words, "otherwise engage in other
14 unlawful sexual conduct." It must be other unlawful
15 sexual conduct; that is, conduct not defined in the other
16 chapters.

17 We've never seen any -- we've never understood
18 exactly --

19 THE COURT: So it has to be -- you're saying that it
20 has to be other sexual conduct that's not defined in
21 those statutes?

22 MR. HAYES: That's right.

23 THE COURT: And those are the statutes that are
24 specifically referred to in the statute.

25 MR. HAYES: Yes, Your Honor. Those are the statutes

1 that they could have pleaded. Again, we would contend
2 that pleading it this broadly is unconstitutional as
3 well.

4 But they could have pleaded again and said, he was
5 traveling for the purpose of violating these three
6 chapters or to engage in otherwise unlawful sexual
7 conduct, after he used a computer to lure, to violate one
8 of those three chapters, or engage in otherwise unlawful
9 sexual conduct. They chose not to include a recitation
10 of those three chapters.

11 They chose to include only the allegation that he
12 was traveling after using a computer to lure or some
13 other unlawful sexual conduct. And they have never named
14 or identified what that conduct might have been.

15 THE COURT: All right. The motion is denied.

16 Is the defense ready to proceed with their case?

17 MR. JUDKINS: We are, Your Honor.

18 THE COURT: Okay. Is the defendant going to
19 testify? Have you had that conversation with your
20 client?

21 MR. JUDKINS: We've had that conversation with him.

22 THE COURT: And so I'd like to inquire. Do you have
23 a final decision because if you do, I'm going to inquire
24 of your client.

25 MR. JUDKINS: I would prefer for you to wait until