

No. SC91195

*In the
Supreme Court of Missouri*

STATE OF MISSOURI,

Respondent,

v.

KASIM FARUQI,

Appellant.

**Appeal from St. Louis County Circuit Court
Twenty-First Judicial Circuit
The Honorable Mark D. Seigel, Judge**

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Kasim Faruqi (“Defendant”) appeals the judgment of the St. Louis County Circuit Court convicting him of attempted enticement of a child (§§ 564.011, 566.151)¹ (L.F. 13, 79-81). Defendant was found guilty following a bench trial before the Honorable Mark Seigel (L.F. 79-81; Tr. 197).

Defendant does not challenge the sufficiency of the evidence to sustain his conviction. Viewed in the light most favorable to the verdict, the evidence presented at trial showed as follows:

In November 2006, the Maryland Heights Police Department conducted an undercover sting operation in which a police officer logged into an Internet chat room posing as a 14-year-old girl (Tr. 31-38). On November 6th, Officer Erica Stough, posing as 14-year-old “Kaitlin,” received an unsolicited instant message from 33-year-old Defendant, who was using the screen name “Kasim786” (Tr. 45, 186, 189; L.F. 48). At the beginning of the chat, “Kaitlin” stated that she was a 14-year-old female (Tr. 46; L.F. 48). Within 20 minutes, Defendant expressed an interest in meeting her in person (Tr. 47; L.F. 48). During the first conversation and the three subsequent conversations Defendant had with “Kaitlin” online and via telephone, Defendant stated that he wanted to hug and kiss “Kaitlin,” touch her breasts, perform and receive oral sex, and have unprotected sex with her (Tr. 57-59, 62; L.F. 53, 55-56, 59, 62, 69). Defendant told “Kaitlin” that he knew that it would be illegal because

¹ All statutory references herein are to the 2006 Cumulative Supplement of the Revised Statutes of Missouri, unless otherwise noted.

she was only 14, and he made her promise that she wouldn't tell anyone (Tr. 62, 80; L.F. 56, 66). Ultimately, they agreed to meet at a park on the evening of November 7th (Tr. 55; L.F. 50, 53-54, 57-60, 62, 65-68, 70).

Defendant showed up at the meeting place at the agreed-upon time and was arrested (Tr. 66, 102, 110). The arresting officers took Defendant to the detective bureau, where he was advised of his *Miranda* rights² (Tr. 112-15). Defendant signed the *Miranda* waiver and agreed to an interview (Tr. 114-16; St. Ex. 1).³ He told the interviewing officer that he had chatted with a girl he thought was 14 years old (Tr. 119). Defendant said that the conversation “turned to sex,” and he had asked the girl if she would allow him to “lick her boobs” and engage in oral sex with him (Tr. 120). He added that he would have been willing to have sexual intercourse with her if she had wanted (Tr. 120). He said that he had believed he would be meeting 14-year-old “Kaitlin” in the park (Tr. 121). In addition to the verbal confession, Defendant provided a written statement, in which he admitted that he had chatted with a 14-year-old girl, that they had talked about sex, and that they had arranged to meet (Tr. 117-18; St. Ex. 2).

Defendant signed a “consent to search” the computer at his workplace that he had used to chat with “Kaitlin” (Tr. 123; St. Ex. 3). Police seized the computer and discovered on

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

³ Additional facts pertinent to the voluntariness of Defendant's statement to police are set forth in Point II, *infra*.

it data fragments corresponding with the chats between Defendant and “Kaitlin” (Tr. 147-53, 157).

Defendant testified at trial (Tr. 179-96). He admitted that he had participated in the chats, but said that he had believed that “Kaitlin” was really an adult, not a 14-year-old girl (Tr. 181-84, 189). He testified that the sexual content of the chats was just fantasy and that he never had any intention of engaging in sexual conduct with “Kaitlin” (Tr. 183). Defendant said that his written statement was coerced by the interviewing officer, who he claimed told him that he could go home if he cooperated (Tr. 185).

At the conclusion of the evidence, the trial court found Defendant guilty of attempted enticement of a child (Tr. 197; L.F. 71). The court sentenced Defendant to five-years imprisonment (Tr. 203; L.F. 79-81).

ARGUMENT

I. (void-for-vagueness challenge)

The trial court did not err in overruling Defendant's motion to dismiss the indictment on the ground that section 566.151, the statute prohibiting the enticement of a child, is void for vagueness.

In his first point, Defendant argues that the trial court erred in overruling his motion to dismiss the indictment because section 566.151, Missouri's statute prohibiting the "enticement of a child," is unconstitutionally vague. App. Br. at 21-43. He claims that, due to inconsistent language between subsections (1) and (2) of the statute, it is unclear whether the State must prove that an "actual child" was enticed, as opposed to an undercover police officer, in order to secure a conviction for enticement. App. Br. at 22-23, 35-43. Defendant contends that the inconsistency renders the statute unconstitutionally vague, in that it fails to give fair notice of the offending conduct, arbitrarily relieves the State of its burden to prove an "actual child victim" in cases involving an undercover police officer, and "has the perverse effect of sanctioning enticement uncovered by adults other than a police officer masquerading as a child." App. Br. at 22-23, 35-39.

Defendant's point fails for at least two reasons. First, whether or not section 566.151 may be considered "vague" in the abstract, there can be no question that Defendant's own case was unaffected by the alleged vagueness because Defendant was charged with *attempted* enticement of a child, not completed enticement. And the law of attempt makes perfectly clear that the State need not prove the existence of an actual child victim to secure a conviction for attempted enticement. Because the statute cannot be considered vague as

applied to the facts of Defendant's case, Defendant's constitutional challenge must be rejected.

Second, the language used in section 566.151 is not vague. A person of ordinary intelligence would have no difficulty understanding what behavior is prohibited by the statute—communications intended to entice children under 15 to engage in sexual conduct. It is true that subsection (2) of the statute, stating that it is “not an affirmative defense . . . that the other person was a peace officer masquerading as a minor,” is poorly worded and is amenable to different interpretations, depending on the rule of statutory construction applied (*i.e.* whether the courts enforce the legislature's intent or simply apply the plain language). But the question before the Court in this case is not one of construction, but of constitutionality. Because this statute may be construed in a reasonable, practical manner that provides fair notice to persons of ordinary intelligence of the prohibited conduct, it is not unconstitutionally void for vagueness.

A. Standard of review

Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision. *State v. Pribble*, 285 S.W.3d 310, 313 (Mo. banc 2009). If at all feasible, the statute must be interpreted in a manner consistent with the constitution, and any doubt about the constitutionality of a statute will be resolved in favor of the statute's validity. *State v. Stokely*, 842 S.W.2d 77, 79 (Mo. banc 1992). The party challenging the validity of the statute has the burden of proving that the act "clearly and undoubtedly" violates constitutional limitations. *Franklin County ex rel. Parks v. Franklin County Comm'n*, 269 S.W.3d 26, 29 (Mo. banc 2008).

B. Analysis

Section 566.151 defines the offense of "enticement of a child" as follows:

1. A person at least twenty-one years of age or older commits the crime of enticement of a child if that person persuades, solicits, coaxes, entices, or lures whether by words, actions or through communication via the Internet or any electronic communication, any person who is less than fifteen years of age for the purpose of engaging in sexual conduct.

2. It is not an affirmative defense to a prosecution for a violation of this section that the other person was a peace officer masquerading as a minor.

3. Enticement of a child or attempt to commit enticement of a child is a felony for which the authorized term of imprisonment shall be not less than five years and not more than thirty years.

1. Section 566.151 is not unconstitutionally vague as applied to the facts of Defendant's case.

In reviewing a defendant's claim that a criminal statute is unconstitutionally vague, this Court evaluates the challenged language by applying it to the case at hand. *Feldhaus v. State*, 311 S.W.3d 802, 806 (Mo. banc 2010). "[I]t is inappropriate to project the challenge to factual situations not presented here in which the language used, as applied, might indeed be vague and confusing." *Id.* "If a statute can be applied constitutionally to an individual, that person will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *State v. Schroeder*, 330 S.W.3d 468, 475 (Mo. banc 2011) (quoting *State v. Self*, 155 S.W.3d 756, 760 (Mo. banc 2005)).

The crux of Defendant's constitutional claim is that inconsistent provisions in section 566.151 make it unclear whether the State is required to prove the existence of an actual child victim to obtain a conviction for enticement. App. Br. at 35-36. But Defendant's case could not possibly have been affected by the language about which he complains because Defendant was charged not with enticement of a child, but rather with attempted enticement (L.F. 13, 44). And there is no question that the State need not prove the existence of an actual child victim to satisfy all the elements of attempted enticement of a child.

To prove an attempt, the State must prove the defendant's purpose in committing the underlying offense and that the defendant took a substantial step toward its commission. *State v. Fleis*, 319 S.W.3d 504, 509 (Mo. App. E.D. 2010) (citing *State v. Wadsworth*, 203 S.W.3d 825, 832-33 (Mo. App. S.D. 2006)); *see also* § 564.011.1. In Missouri, it is no

defense to an attempt charge “that the offense attempted was, under the actual attendant circumstances, factually or legally impossible of commission, if such offense could have been committed had the attendant circumstances been as the actor believed them to be.” § 564.011.2. Thus, to obtain a conviction for *attempted* enticement of a child, the State must prove beyond a reasonable doubt that: (1) the defendant was 21 years old or older; (2) he communicated with someone he believed to be under the age of 15; (3) his purpose was to entice, solicit, coax, persuade, or lure her to engage in sexual conduct; and (4) he committed an act which constituted a substantial step toward the commission of that offense. *State v. Davies*, 330 S.W.3d 775, 787 (Mo. App. W.D. 2010); §§ 564.011, 566.151.

Defendant argues that subsection (2) of section 566.151 is confusing in that it is unclear whether the State, in seeking to convict a defendant for enticement, is ultimately excused from proving the existence of an actual child when an undercover police officer was involved. But when a defendant is charged with attempted enticement, rather than completed enticement, subsection (2) is irrelevant. It does not matter, for purposes of proving attempted enticement, whether the defendant was communicating with an actual child, an undercover officer, or any other adult masquerading as a child under 15. The focus of the offense is on whether Defendant believed he was communicating with a person under the age of 15. *See e.g. Davies*, 330 S.W.3d at 787. Because it is neither a defense nor an affirmative defense to a charge of attempted enticement that the person “enticed” was an undercover police officer, the language that Defendant focuses on has no bearing on an ordinary person’s ability to understand the charge and poses no risk of arbitrary or inconsistent enforcement. As applied to the facts of Defendant’s case, there is nothing vague about the enticement statute.

Apparently anticipating this problem, Defendant offers three reasons why he should be permitted to facially attack the enticement statute, even though he was convicted of attempted enticement. First, he argues that there is, in fact, no bar to a defendant attacking a statute as facially vague, irrespective of the statute's application to his own case. App. Br. at 24. In support, he cites *City of Chicago v. Morales*, 527 U.S. 41 (1999), in which the United States Supreme Court declared that a Chicago city ordinance prohibiting "loitering" was vague on its face. *Id.* at 55-60. Based on *Morales*, Defendant suggests that this Court should entertain his facial attack on section 566.151. App. Br. at 24.

But Defendant's argument fails to recognize the extraordinarily narrow scope of the holding in *Morales*. Before considering the facial attack on the loitering ordinance, the Court in *Morales* noted that the ordinance contained no *mens rea* requirement and infringed on citizens' constitutionally protected right to move about in public places. 527 U.S. at 53-55. Having so noted, the Court held, "When vagueness permeates the text of such a law, it is subject to facial attack." *Id.* at 55.

Missouri's child-enticement statute does not suffer from the problems that plagued Chicago's loitering ordinance. Section 566.151 has a very clear *mens rea* requirement—a defendant can be found guilty of enticement only if his purpose is to actually engage in sexual conduct. § 566.151.1. Further, the statute does not infringe upon any constitutionally protected rights. *See Pribble*, 285 S.W.3d at 316 (holding that the statute does not make unlawful any speech or conduct that is entitled to constitutional protection). Therefore, section 566.151 is not "such a law" that is subject to a facial attack under the holding of *Morales*.

Since *Morales* was decided, the United States Supreme Court has cautioned against allowing facial challenges to the validity of statutes. See *Sabri v. United States*, 541 U.S. 600, 608-09 (2004). In *Sabri*, the Court observed that facial challenges should be discouraged in that they invite judgments on fact-poor records and require a relaxation of general principles of standing in favor of allowing a litigant to argue “that the law would be unconstitutionally applied to different parties and different circumstances from those at hand.” *Id.* at 609. And just last year, the Court reaffirmed its longstanding rule that it “consider[s] whether a statute is vague as applied to the particular facts at issue, for ‘[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.’” *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2718-19 (2010).

Second, Defendant argues that because a defendant charged with attempted enticement may challenge the enticement statute as facially overbroad, it follows that he should also be able to challenge the statute as facially vague. App. Br. at 24-25. This argument ignores the fundamental difference between a First-Amendment overbreadth challenge and a vagueness challenge under the Due Process Clause. The First Amendment overbreadth doctrine is a narrow exception to the normal rule prohibiting facial attacks on statutes. *Virginia v. Hicks*, 539 U.S. 113, 118 (2003). This exception is motivated by the concern that “the threat of enforcement of an overbroad law may deter or ‘chill’ constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.” *Id.* at 119. Even so, unless the complaining party can show “a realistic danger that the statute itself will significantly compromise recognized First Amendment protections

of parties not before the Court,” the statute will not be subject to facial challenge on overbreadth grounds. *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

A due-process vagueness challenge, on the other hand, “does not turn on whether a law applies to a substantial amount of protected expression.” *Holder*, 130 S.Ct. at 2719. The rationale underlying the overbreadth exception to the general prohibition on facial challenges thus does not apply here. Defendant cannot seek relief based upon alleged vagueness in a statute that did not affect his case.

Finally, Defendant cites to a handful of cases from other jurisdictions in which courts have entertained vagueness challenges to statutes defining completed offenses from defendants charged with attempt or conspiracy to commit those offenses. App. Br. at 25 n.3. Defendant’s reliance on these cases is misplaced. In each case, the defendant claimed that the criminal offense that he was charged with attempting to violate was vague in that key terms used in the statute were undefined and could not be understood by ordinary persons. *See United States v. Rudzavice*, 586 F.3d 310, 314-15 (5th Cir. 2009) (defendant charged with attempting to transfer obscene material complained that the term “obscene” was vague); *United States v. Hsu*, 40 F.Supp.2d 623, 625-26 (E.D. Pa. 1999) (defendant charged with attempted theft of trade secrets claimed that the term “trade secret” was vague); *People v. Castro*, 657 P.2d 932, 938-39 (Colo. 1983) (defendant charged with attempt to commit “extreme indifference murder” argued that the term “extreme indifference” was vague); *Skilling v. United States*, 130 S.Ct. 2896, 2927-28 (2010) (defendant charged with conspiracy to commit “honest-services” wire fraud contended that the phrase “the intangible

right of honest services” was vague). In essence, these defendants argued that the behavior that they engaged in was not “clearly proscribed” by the law. For example, a defendant cannot be condemned for attempting to transmit obscene material if it is unclear what “obscene” material is.

Defendant’s vagueness challenge is different. His behavior—communicating with a person who he believed was 14 years old for the purpose of engaging in sexual conduct—is “clearly proscribed” by Missouri law, specifically the law prohibiting attempted enticement of a child. *See Davies*, 330 S.W.3d at 787; §§ 564.011, 566.151.1. The portion of section 566.151 that Defendant claims renders the statute vague does not affect an attempted enticement charge. Defendant cannot (and does not) contend that the offense he was convicted of violating—attempted enticement—is void for vagueness, nor does he make any effort to explain how the alleged vagueness in the enticement statute affected his case. Critically, he does not contend that he did not understand that soliciting sex from a person he believed was a 14-year-old girl was illegal; indeed, the evidence shows the contrary, as he stated specifically during the chat that he knew sex with “Kaitlin” would be illegal because she was only 14 (L.F. 56). Defendant’s conduct was “clearly proscribed” by law and he knew it. For this reason, his constitutional challenge to the enticement statute should be denied without consideration on the merits.

2. The language of section 566.151 is not unconstitutionally vague.

Assuming, for the sake of argument, that Defendant is a proper party to attack section 566.151 as unconstitutionally vague, his challenge must fail because section 566.151, both as interpreted by Defendant and by its plain language, is not vague.

“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *State v. Brown*, 140 S.W.3d 51, 54 (Mo. banc 2004) (citing *Cocktail Fortune, Inc. v. Supervisor of Liquor Control*, 994 S.W.2d 955, 957 (Mo. banc 1999)). The void-for-vagueness doctrine “ensures that laws give fair and adequate notice of proscribed conduct and protects against arbitrary and discriminatory enforcement.” *Feldhaus*, 311 S.W.3d at 806. “The test in enforcing the doctrine is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.” *Id.* Even so, “neither absolute certainty nor impossible standards of specificity are required in determining whether terms are impermissibly vague.” *State v. Dunn*, 147 S.W.3d 75, 77 (Mo. banc 2004).

a. Section 566.151, as construed by Defendant, is not vague.

Defendant contends that section 566.151 is unconstitutionally vague because subsections (1) and (2) are inconsistent. App. Br. at 35-43. He argues that whereas subsection (1) requires the State to prove the existence of an actual child under 15 to secure a conviction for enticement, subsection (2) allows the State to prove the defendant enticed a police officer masquerading as a child, rendering the age element of subsection (1) meaningless. App. Br. at 36. In other words, Defendant reads subsection (2) to mean that it is not a *defense* to enticement that a peace officer was masquerading as a child, even though the statute uses the term “affirmative defense.” App. Br. at 33, 35-43. Based on this interpretation, Defendant claims that the statute is vague because it is unclear whether the

State is still required to prove the existence of an actual child in cases where a police officer masqueraded as the child. App. Br. at 38, 43.

Defendant is probably right that subsection (2) was intended to mean, “It is not a *defense* to a prosecution for a violation of this section that the other person was a peace officer masquerading as a minor.” As Defendant notes, the General Assembly likely intended “to allow for sting operations of adults attempting enticement of children on the Internet.” App. Br. at 43. The problem, of course, is that the statute uses the phrase “affirmative defense,” which is a term of art referring to defenses upon which the defendant bears the burden of proof. *See* § 556.056. If section 566.151.2 is applied literally, a defendant could still defend against an enticement charge by arguing that the person “enticed” was an undercover law-enforcement officer who was over the age of 15—that defense would simply be one upon which the defendant would not bear the burden of proof.

This cannot be what the legislature intended. Defenses are “not affirmative defenses” by default; to say that “it is not an affirmative defense” that a peace officer was masquerading as a child is meaningless. It is presumed that the legislature did not insert idle verbiage or useless language into a statute. *See Turner v. State*, 245 S.W.3d 826, 828 (Mo. banc 2008).

The phrase “not an affirmative defense” appears in other statutes in Chapter 566, and the context in which the phrase is used in those statutes supports the construction that it is intended to mean “not a defense.” For example, section 566.020 contains a provision stating that, “Consent is not an affirmative defense to any offense under chapter 566 if the alleged victim is less than twelve years of age.” § 566.020.4. If the “not an affirmative defense”

language is applied according to its strict meaning, consent could potentially be a defense to an alleged act involving a victim less than twelve years old; it just would not be a defense on which the defendant had the burden of producing evidence and the burden of persuasion. The legislature could not possibly have so intended. The only reasonable reading of section 566.020.4 is that consent is not a *defense* to alleged acts involving a victim less than twelve years old.

Similarly, section 566.145 criminalizes sexual contact between prisoners and correctional officers and contains a provision stating that consent of the prisoner is not an affirmative defense. § 566.145.4. If the phrase “not an affirmative defense” is taken at face value, consent could still be a defense. But that would be contrary to the legislature’s obvious intent to prohibit sexual relations between correctional employees and inmates, whether consensual or not.

Section 566.083 creates the offense of exposing one’s genitals to a child and, like section 566.151.2, states that “it is not an affirmative defense to a violation of this section that the other person was a peace officer masquerading as a minor.” § 566.083.3. That language also appears in section 573.040, which creates the offense of furnishing pornographic materials to minors. § 573.040.2, RSMo Supp. 2008. And sections 566.212 and 566.213 create the respective offenses of sexual trafficking of a child and sexual trafficking of a child under the age of twelve. Both statutes have provisions stating that mistake as to age is not an affirmative defense. §§ 566.212.2, RSMo Supp. 2004; 566.213.2. Again, these are statutes designed to protect children, and a construction of “not an affirmative defense” to

nevertheless permit a “defense” of mistake of age or that the intended victim was a police officer would subvert that intent.

Recently, in *State v. Hall*, the Southern District interpreted the phrase “not an affirmative defense” in section 566.083 (criminalizing sexual misconduct involving a child) to mean “not a defense.” 321 S.W.3d 453, 455-56 (Mo. App. S.D. 2010). The court observed that the purpose of the statute was to protect children, and that “it would be absurd to require the police to force a child to view graphic images of an adult’s genitals during their undercover operations so as to ensure technical completion of the crime.” *Id.* at 456. The court further explained that to interpret the phrase “it is not an affirmative defense that the other person was a peace officer masquerading as a minor” at face value, while still permitting a defense that the other person was a peace officer, would render the subsection “meaningless.” *Id.* Thus, the court rejected that construction. *Id.*⁴

⁴ In a concurring opinion, Judge Scott observed that the legislature might consider revising the statute to avoid any potential ambiguity, pointing to statutes covering similar subject matter in other states that are better drafted. *Hall*, 321 S.W.3d at 457-58 (Scott, J., concurring). Defendant makes the same point in his brief, identifying statutes in numerous other jurisdictions that contain language avoiding the problem troubling Missouri’s statute. App. Br. at 39-42 n.15-16. The language used in the statutes of these other states may, in fact, be preferable to the language used in Missouri’s statute. It does not follow, however, that Missouri’s statute is unconstitutional.

Courts are to construe statutes in a common-sense manner consistent with legislative intent. *State v. Bouse*, 150 S.W.3d 326, 332 (Mo. App. W.D. 2004). In order to give statutes an interpretation which corresponds with the legislative objective, the strict letter of the statute must, where necessary, yield to the manifest intent of the legislature. *State v. Conduct*, 65 S.W.3d 6, 12 (Mo. App. S.D. 2001). If section 566.151.2 is to be interpreted in a manner that fulfills the legislative objective, it must be construed as saying that it is no defense to a prosecution under the statute that the victim was an undercover officer masquerading as a child.

Under this construction, Missouri's enticement of a child statute is not unconstitutionally vague. Subsection (1) of the statute prohibits an adult (at least 21 years old) from persuading, soliciting, coxing, enticing, or luring a person under the age of 15 for the purpose of engaging in sexual conduct. § 566.151.1. Subsection (2), if construed in the manner outlined above, indicates that a perpetrator cannot defend against an enticement charge by arguing that the person "enticed" was an undercover officer rather than an actual child. A person of ordinary intelligence would have no difficulty understanding what this means—if an adult entices a minor *or* an undercover officer posing as a minor for the purpose of engaging in sexual conduct, he can be convicted of child enticement. While this statute is certainly vulnerable to legal arguments regarding its proper construction,⁵

⁵ Of course, as argued above, this Court should not reach the merits of Defendant's constitutional challenge to the enticement statute because Defendant was charged with

Defendant has failed to prove that a person of ordinary intelligence would be unable to understand what conduct is prohibited or that the language of the statute invites arbitrary or discriminatory enforcement. Thus, the statute cannot be considered void-for vagueness.

b. The plain language of section 566.151 is not vague.

Alternatively, if this Court does not agree that the phrase “not an affirmative defense” should be construed to mean “not a defense” in the context of the child-enticement statute, Defendant’s void-for-vagueness claim fails because the plain language of the statute is not at all vague. Generally, when considering whether a law is vague, this court looks to the “plain language” used in the statute. *See State v. Koetting*, 616 S.W.2d 822, 826 (Mo. banc 1981). The law will be held valid if any reasonable and practical construction will support it, and the courts must endeavor by every rule of construction to give it effect. *State v. Duggar*, 806 S.W.2d 407, 408 (Mo. banc 1991).

Here, section 566.151.1, setting forth the elements of enticement of a child, requires proof that the alleged perpetrator communicated with “a person who is less than fifteen years of age.” Subsection (2) states that it is “not an affirmative defense” that the person was, in fact, a peace officer masquerading as a minor. § 566.151.2. Despite Defendant’s protestations, there is nothing inconsistent about the plain language of those two provisions. According to subsection (1), the State must prove that the defendant communicated with a person who was less than 15 to secure a conviction for enticement of a child. The plain

attempted enticement, a different offense which is unaffected by the enticement statute’s alleged deficiencies.

language of subsection (2) does not relieve the State of proving that element—it simply states that if the defendant’s target was, in reality, an undercover police officer, the defendant does not bear the burden to inject or prove that defense. §§ 566.151.2, 556.056. This provision is functionally meaningless, because no defense is an affirmative defense unless it is expressly designated as such, but it does not conflict with subsection (1).

Defendant’s contention that subsections (1) and (2) are inconsistent depends on his assumption that the plain language of the statute will be ignored and that subsection (2) will be read as precluding any *defense* that the person with whom the defendant communicated was an undercover officer. App. Br. at 35-38. But this argument asks the Court to engage in statutory construction for no purpose other than to generate uncertainty about the statute’s meaning. The Court should not create a constitutional defect through interpretation where none exists on the face of the statute.

Defendant cites several cases in which statutes were deemed void for vagueness due to internal inconsistencies. These cases are distinguishable. In each, the plain statutory language contained omissions or conflicts that made the meaning of the statute impossible to determine. *See United States v. Evans*, 333 U.S. 483, 483-84 (1948) (statute prohibited “concealing or harboring” illegal aliens but provided no penalty for that conduct); *United States v. Cardiff*, 344 U.S. 174, 174-77 (1952) (statutory scheme required inspectors to get permission to enter factories, implying that owners could withhold consent, yet prohibited the owners from refusing entry to the inspectors); *Board of Educ. of St. Louis v. State*, 47 S.W.3d 366, 370-71 (Mo. banc 2001) (statute stated that school-board subdistricts were to be established by the board of education, but then went on to preemptively define the

composition of the subdistricts); *Mason v. Home Depot U.S.A., Inc.*, 658 S.E.2d 603, 606, 608 (Ga. 2008) (statute allowing the admission of expert testimony contained conflicting language on whether that testimony had to be based on admissible evidence); *Commonwealth v. Gagnon*, 441 N.E.2d 753, 754-55 (Mass. 1982) (statute provided that offense was punishable by imprisonment *or* a fine, yet simultaneously required that anyone convicted must serve a mandatory minimum one-year prison term).

The plain language of section 566.151, by contrast, contains no such inconsistencies. Defendant asks this Court to declare section 566.151 void for vagueness based on a construction that departs from the statute's plain language. This Court should decline Defendant's invitation and reject his constitutional challenge.

c. Severability

Finally, if this Court decides to entertain Defendant's facial vagueness challenge to section 566.151 and concludes that subsection (2) is so confusing that the statute fails to provide a person of ordinary intelligence with a definite warning as to the prohibited conduct, the Court should simply strike subsection (2) and uphold the remainder of the statute. Missouri law specifically provides for the severability of statutory provisions:

The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions,

standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

§ 1.140; *see also Board of Educ. of City of St. Louis*, 47 S.W.3d at 371 (approving of the severance of unconstitutionally vague statutory provisions).

In this case, Defendant does not contend that subsection (1) of section 566.151 is in any respect vague. The statute becomes vague, Defendant argues, because an ordinary person might misunderstand “not an affirmative defense” in subsection (2) to mean “not a defense,” and thus become confused about whether he would be guilty of enticement of a child if he unwittingly solicited a undercover police officer, believing the officer to be a child, for the purpose of engaging in sexual conduct. For the reasons outlined above, Defendant’s concerns about subsection (2) do not render the statute unconstitutional. But if the Court finds that subsection (2) is so defective that its operation violates the Due Process Clause, the Court can simply strike the subsection and leave the remainder of the statute intact.

It cannot be said that subsection (1) is “so essentially and inseparably connected” with subsection (2) that the statute would not have been enacted without the latter provision. Without subsection (2), the State can continue to prosecute individuals who are caught “enticing” undercover police officers, thinking they are children, by charging those individuals with attempted enticement, as was done in this case. And subsection (1) plainly stands on its own; subsection (2), as written, has no practical effect.

In any event, striking subsection (2) as void-for-vagueness would not entitle Defendant to relief. As explained above, Defendant was charged with attempted enticement of a child. The law is clear that factual impossibility (*i.e.* the absence of an actual child) is

not a defense to attempted enticement if the defendant believed he had been communicating with a child. §§ 564.011.2, 566.151; *Davies*, 330 S.W.3d at 787. Thus, Defendant's first point, in which he demands that his convictions be reversed and that he be discharged due to the alleged vagueness of the child-enticement statute, fails for myriad reasons and should be denied.

II. (voluntariness of Defendant's statements)

The trial court did not clearly err in overruling Defendant's motion to suppress the oral and written statements Defendant made following his arrest.

In his second point, Defendant argues that the oral and written statements that he made to Detective Steven Osterloh should have been suppressed because the statements were involuntary in that they were "procured" by false statements that rose to the level of "implied threats." App. Br. at 44-55. Defendant focuses on two allegedly coercive lines of inquiry during the interview. First, he contends that Detective Osterloh's false representation that parents of the fictitious 14-year-old girl were set on "obtaining justice" implied to Defendant that he could be prosecuted for sexual assault and that he might face a civil suit for money damages. App. Br. at 52. Second, he argues that Detective Osterloh "talked with [Defendant] about his immigration status and country of origin, planting seeds of worry that non-cooperation could lead to deportation." App. Br. at 52. Defendant concludes that "the implied threat of a charge of sexual assault, combined with discussions about the nationality and immigration status of [Defendant] who had a diminished understanding of English and no familiarity with the American criminal justice system, created a set of circumstances which coerced [Defendant] to make incriminating statements." App. Br. at 54-55.

But Defendant's argument misrepresents Detective Osterloh's statements during the interview. Although the detective did tell Defendant, falsely, that the allegations against him were based on a parental complaint rather than on an undercover police investigation, the detective never threatened that Defendant could be prosecuted for sexual assault or said that there was any possibility that Defendant would be sued. And while the detective asked

Defendant about his country of origin and about the customs of that country, he never suggested that Defendant might be deported. Most importantly, the detective never stated or implied that Defendant would be rewarded if he made a statement or would suffer any penalty if he did not. The trial court's ruling denying Defendant's motion to suppress his statements was supported by substantial evidence and should be affirmed.

A. Additional facts

After Defendant's arrest, Detective Osterloh interviewed Defendant at the detective's bureau (STR1 11-12; Tr. 110-11). The detective was unarmed and alone with Defendant in the interview room (Tr. 113).

Detective Osterloh began the interview by advising Defendant of his rights (STR1 12; Tr. 14). He asked whether Defendant could read and write in English; Defendant responded that he could (STR1 12). Defendant read the first line of the *Miranda* form aloud and confirmed that he understood (STR1 12). Then Detective Osterloh read each of Defendant's rights to Defendant (STR1 13; Tr. 114-15). After each right was read, Defendant acknowledged that he understood it and marked it with his initials (STR1 13; Tr. 114-15; St. Ex. 1). When Osterloh finished going through the rights form, Defendant said that he understood his rights and signed the waiver form (STR1 13; Tr. 115-16; St. Ex. 1).

Detective Osterloh told Defendant that the police were investigating the complaints of parents of a 14-year-old girl who were concerned that Defendant was trying to have sex with their daughter (STR1 37; Tr. 121). Osterloh's intent was that Defendant might feel sympathy for these parents and, as a result, feel moved to make an incriminating statement (STR1 37). During the course of the interview, Osterloh also learned that Defendant was from Pakistan

(STR1 38; Tr. 128, 131). Osterloh asked Defendant about the customs of his home country and whether he was familiar with the laws of the United States “as far as having sex with a minor” (STR1 38; Tr. 131). Osterloh later testified that, in asking these questions, he was “trying to get into [Defendant’s] head” (STR1 38; Tr. 131).

Defendant admitted to Detective Osterloh that he had chatted online with a girl he thought was 14 years old and that he had asked her if she would engage in sexual acts with him (Tr. 119-20). He said that when he went to the park, he believed he would be meeting a 14-year-old girl named Kaitlin (Tr. 121-22). At no point during the interview did Defendant indicate to Osterloh that the chats had just been “pretend” (Tr. 121-22).

After making his verbal statement to Detective Osterloh, Defendant agreed to make a written statement (STR1 16-17; Tr. 117-18; St. Ex. 2). When Defendant finished his first draft of the statement, Osterloh asked him to include additional details (STR1 42; Tr. 133). Osterloh did not, however, tell Defendant what to write (STR1 24, 43; Tr. 133). Osterloh testified that he did not make any threats or promises to Defendant to induce him to make a statement (STR1 23; Tr. 132).

B. Standard of review

“This Court reviews a trial court’s ruling on a motion to suppress in the light most favorable to the ruling and defers to the trial court’s determinations of credibility.” *State v. Schroeder*, 330 S.W.3d 468, 472 (Mo. banc 2011). “The inquiry is limited to determining whether the decision is supported by substantial evidence.” *Id.* The Court will consider evidence presented at both the pre-trial suppression hearing and at trial to determine whether

sufficient evidence exists to support the trial court's ruling. *State v. Gaw*, 285 S.W.3d 318, 319 (Mo. banc 2009).

C. Analysis

“The Due Process Clause of the Fourteenth Amendment provides that no State shall ‘deprive any person of life, liberty, or property, without due process of law.’” *Colorado v. Connelly*, 479 U.S. 157, 163 (1986); U.S. CONST. amend. XIV. With respect to confessions, the Due Process Clause requires that a confession must be “voluntary” to be admissible in evidence. *See e.g. Dickerson v. United States*, 530 U.S. 428, 433 (2000).

“The test for whether a confession is voluntary is whether the totality of the circumstances created a physical or psychological coercion sufficient to deprive the defendant of a free choice to admit, deny, or refuse to answer the examiner's questions.” *State v. Simmons*, 944 S.W.2d 165, 173 (Mo. banc 1997). In determining whether a defendant's confession resulted from improper coercion, this Court considers a range of factors relating to the defendant, including his age, experience, intelligence, gender, lack of education, infirmity, and unusual susceptibility to coercion. *Id.* at 175. In addition, the Court considers whether the defendant was advised of his rights, the length of the detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). Coercive police activity is a “necessary predicate” to a finding that a confession is not “voluntary” within the meaning of the Due Process Clause. *Connelly*, 479 U.S. at 167.

In this case, none of the factors listed above suggests that Defendant's statements to Detective Osterloh were involuntary. Defendant was 33 years old at the time of the

interview, is male, and is well-educated, having had two years of college (Tr. 180, 186). He was advised of his rights before the interview began and indicated that he understood them (STR1 13; Tr. 114-16; St. Ex. 1). Although English is apparently not Defendant's native language, the record shows that he understands English well—he indicated no difficulty understanding Osterloh during the interview, he wrote his statement in English, and he assured the judge at trial that he had been able to understand everything the State's witnesses had said (STR1 12-13, 22; Tr. 116-18, 180; St. Ex. 2). And nothing in the record indicates that the physical conditions of the interview were coercive. Defendant was uncuffed, and the interview lasted no more than two hours (Tr. 113; St. Ex. 2).⁶ More than sufficient evidence existed to support the trial court's conclusion that Defendant's statements were not coerced by police.

Indeed, Defendant does not claim that he was unusually susceptible to coercion or that the conditions of the interview compelled him to confess. Instead, he argues that two lines of inquiry by Detective Osterloh constituted "implicit threats." App. Br. at 44-46, 51-55. Specifically, Defendant contends that: (1) Osterloh's false representation that the police had received a complaint from a 14-year-old's parents that Defendant was trying to have sex with their daughter caused Defendant to fear that he would be prosecuted for sexual assault and would be sued for civil damages, and (2) Osterloh's inquiries about Defendant's "immigration status and country of origin" caused Defendant to worry that he might be

⁶ Defendant was arrested in the park sometime after 7 pm (STR2 15); he made his written statement at 9:01 pm (St. Ex. 2).

deported. App. Br. at 52-53. To support his claims, Defendant relies on the following portion of defense counsel's cross-examination of Detective Osterloh at the suppression hearing:

Q [by defense counsel]: Okay. Now, you began your interrogation of Mr. Faruqi by lying to him about fictitious complaints from the parents of a 14-year-old girl, concerning the exploitation of their daughter, is that correct?

A [by Detective Osterloh]: That's correct.

Q: You told him that the fictitious parents of this imaginary daughter had made a complaint about him trying to have sex with their 14-year-old daughter, which was a lie; isn't that correct?

A: Yes.

Q: It was your intention for him to believe those lies; isn't that correct?

A: Yes.

Q: And by believing those lies, you thought that this would help you in your interrogation of Mr. Faruqi; isn't that correct?

A: Yes.

Q: It was your hope that if he believed these lies and felt sympathy for the parents of this imaginary 14-year-old girl, that he would make admissions to you that would help you convict him; isn't that correct?

A: I don't know that I would say it was my hope. That was the intent.

Q: That was your intention?

A: Yes.

Q: Yes. And that worked, didn't it?

A: Yes.

Q: Yes. You also told Mr. Faruqi that he was being accused of trying to have sex with
quote, the girl; isn't that right?

A: Yes.

Q: That was another part of the lie; right?

A: Yes.

Q: You write in your report that you asked Mr. Faruqi about customs of his country;
isn't that correct?

A: Yes.

Q: And in your deposition, you stated that the purpose of that question was to
determine if he understood the laws, quote, of this country as far as having sex with a
minor, unquote. Do you remember giving that answer?

A: Yes, sir.

Q: You also said that this question had no relevance and that you were only, quote,
trying to get into Mr. Faruqi's head, unquote. Do you recall saying that to me?

A: Yes.

...

Q: So what you were trying to do by your questions, which were lies, contained lies,
was to get into his head; correct? Right?

A: And to get to the truth.

Q: Yes. Now, you then asked Mr. Faruqi how he, quote, met the girl, when in fact
there was no girl; right? This was another lie?

A: Yes.

Q: So as part of your lies, you were trying to convince Mr. Faruqi that, in fact, there was a girl when, in fact, there wasn't a girl. Isn't that correct?

A: Yes.

App. Br. 49-51 (quoting STR1 37-39).

Defendant's claim that Detective Osterloh's "misrepresentations" coerced his statements fails for at least three reasons. First, despite Defendant's representation in his brief that he was afraid that he would be charged with sexual assault, would be sued by "the girl's parents," or would be deported (App. Br. at 52), nowhere in the record is there any indication that Detective Osterloh or anyone else ever threatened that those things might happen. Nor does it appear from the record that Osterloh even asked Defendant about his "immigration status"; the record shows only that Osterloh asked about Defendant's country of origin, the customs of that country, and Defendant's understanding of the laws of the United States with respect to adults having sex with minors (STR1 38; Tr. 131). If Defendant did, in fact, fear prosecution for sexual assault, a civil suit, and deportation, those fears arose from Defendant's own imagination, not any statement or conduct on the part of Detective Osterloh. And, as the Southern District Court of Appeals explained in *State v. Gray*, a confession cannot be deemed involuntary simply because it allegedly resulted from imagined fears:

If an intentional and truthful statement must be deemed to be involuntary, merely by reason of imagined dangers conjured up by an apprehensive suspect, a greater burden would be placed on law enforcement than any which judicial solicitude for persons

charged with crime has hitherto created. There would be no objective standards for determining voluntariness, and no limit but the ingenuity of the defendant to the grounds for invalidity of confessions.

100 S.W.3d 881, 889-90 (Mo. App. S.D. 2003) (quoting *Chaney v. Wainwright*, 561 F.2d 1129, 1132 (5th Cir. 1977)). In short, the “threats” about which Defendant complains simply weren’t made.

Second, even if Detective Osterloh had suggested to Defendant that he could face a sexual-assault charge, a possible civil suit, and deportation, such statements would not constitute “threats” that would render Defendant’s confessions involuntary because they would merely be an accurate recitation of the possible consequences of Defendant’s actions. *See Simmons*, 944 S.W.2d at 176 (holding that telling a first-degree murder suspect that he could receive the death penalty is not a threat “but is a permissible observation of the possible consequences of first-degree murder”). Critically, none of the “threats” alleged by Defendant suggested that Defendant would be suffer harm for refusing to confess; the “threats” about which Defendant complains were all directed at the possible consequences of enticing a child for sexual purposes. App. Br. at 52-55. There is no reason to believe that, even had these “threats” been made, they would have been likely to induce Defendant to incriminate himself. *See State v. Barriner*, 210 S.W.3d 285, 303 (Mo. App. W.D. 2006) (holding that interviewer’s comment during interrogation that the sheriff was angry about the defendant’s conduct and wanted to see the defendant in jail did not render the defendant’s subsequent confession involuntary, noting that the comment did not suggest that there would be any benefit to the defendant to confess).

Finally, the fact that Detective Osterloh provided Defendant with false information regarding the investigation does not invalidate Defendant's confession. Police trickery does not necessarily make a defendant's statements involuntary. *See State v. Phillips*, 563 S.W.2d 47, 54 (Mo. banc 1978). Statements obtained by subterfuge on the part of the police "are admissible unless the deception offends societal notions of fairness or is likely to produce an untrustworthy confession." *State v. Davis*, 980 S.W.2d 92, 96 (Mo. App. E.D. 1998). It is well-settled, for example, that "[c]onfessions obtained by falsely leading an accused to believe an accomplice has made statements implicating the accused are admissible." *Simmons*, 944 S.W.2d at 176 (citing *State v. Flowers*, 592 S.W.2d 167, 169 (Mo. banc 1979)); accord *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (holding that the fact that police falsely told a suspect that an accomplice had confessed was, while relevant to a voluntariness determination, insufficient to make an otherwise voluntary confession inadmissible).

In this case, Detective Osterloh's false representation that police were responding to complaints made by parents of a 14-year-old girl was not the sort of subterfuge that "offends societal notions of fairness." "The law has long condoned in numerous instances the use of 'trickery and subterfuge' by confidential informants and undercover agents to obtain confessions and other evidence of crime." *United States v. Smalls*, 605 S.W.3d 765, 787 n.20 (10th Cir. 2010); cf. *Illinois v. Perkins*, 496 U.S. 292, 300 (1990) (noting that the use of undercover agents "is a recognized law enforcement technique"). In this case, although Detective Osterloh himself was not undercover, his story about the 14-year-old girl during the interview was simply a part of the undercover operation already underway (Tr. 121). Indeed, requiring that police interviewers be unfailingly truthful with suspects they interview

would seriously hinder undercover operations, as police might need to conduct interviews before the undercover investigation is over but would feel they could not do so because they would compromise the operation if they could not deceive the interviewee about certain facts relating to the investigation.

Moreover, nothing about Osterloh's misrepresentation was likely to produce an untrustworthy confession. There is no reason to think that a suspect who had not, in fact, engaged in sexual communications with a person he believed to be a 14-year-old girl would be more likely to falsely confess if he was told that the child's parents were upset about it.

Defendant's case is thus unlike *Spano v. New York*, 360 U.S. 315 (1959), *Lynumn v. Illinois*, 372 U.S. 528 (1963), and *Ex parte McCary*, 528 So.2d 1133 (Ala. 1988), three cases upon which Defendant relies. App. Br. at 47-48, 53-54. In *Spano*, the defendant confessed only after eight hours of continual interrogation, at the end of which a long-time friend falsely told the defendant that if he did not confess, he (the friend) would lose his job. *Spano*, 360 U.S. at 319, 323. In *Lynumn*, the interrogating officer told the defendant that if she did not cooperate her children would be taken away, but if she did as he asked she would receive leniency and could keep her children. *Lynumn*, 372 U.S. at 531-33. And in *McCary*, the police implied that if the suspect confessed to a robbery he could avoid being charged with murder. *McCary*, 528 So.2d 1133-34.

It is obvious that falsehoods such as those employed by the investigators in *Spano*, *Lynumn*, and *McCary* might induce false confessions—a suspect might decide to falsely admit misconduct to avoid an unpleasant alternative. No such choice was posed to Defendant. Detective Osterloh never suggested that Defendant would suffer any adverse

consequence if he chose not to make a statement. To the contrary, Osterloh's intent in mentioning the "parents" was to evoke sympathy, thinking that Defendant might choose to confess because he felt guilty about what he had done (STR1 37-38). And his questions about Defendant's country of origin were directed at whether Defendant understood that in the United States sexual activity between adults and children is unlawful (STR1 38). As noted above, a person who did not attempt to solicit sex from a person he believed to be a minor is not likely to confess to doing so because he finds out that the child's parents are angry. If anything, he is more likely to profess his innocence.

The trial court's ruling denying Defendant's motion to suppress his statements was supported by substantial evidence and was not clearly erroneous. Point II should be denied.

III. (search of T-Mobile computer)

The trial court did not clearly err in overruling Defendant's motion to suppress the evidence obtained from the search of the computer Defendant used at work.

In his final point, Defendant argues that the evidence discovered on his work computer should have been suppressed because it was discovered as a result of an unlawful search. App. Br. at 56-67. He acknowledges that he consented to the search of the computer, but contends that the computer was owned by his employer, T-Mobile, that he had "plainly no ownership interest" in the computer, and that he lacked actual or apparent authority to consent. App. Br. at 58-64.

Assuming that Defendant is correct in his assertion that only T-Mobile, the owner of the computer, had a sufficient interest in the computer to be able to lawfully consent to a search, it is apparent that Defendant lacks standing to challenge the constitutionality of the

search. He failed to offer any evidence whatsoever to suggest that he had a legitimate expectation of privacy in T-Mobile's company computer. The trial court thus cannot have clearly erred in overruling Defendant's motion to suppress the fruits of the search. Furthermore, Defendant has failed to even allege, let alone demonstrate, that he was prejudiced by the admission of the evidence found on the computer. The evidence was cumulative to evidence already admitted and was not inconsistent with the defense theory, which was that Defendant had participated in the chats but believed that he was simply engaging in fantasy talk with an adult. Defendant's third point should be denied.

A. Standard of review

As noted in Point II, *supra*, this Court reviews a trial court's ruling on a motion to suppress in the light most favorable to the ruling; the inquiry is limited to whether the decision is supported by substantial evidence. *Schroeder*, 330 S.W.3d at 472. Whether conduct violates the Fourth Amendment, however, is a question of law that is reviewed *de novo*. *Id.*

B. Analysis

1. Standing

The Fourth Amendment guarantees that “[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches shall not be violated” U.S. CONST. amend. IV. Article I, section 15 of the Missouri Constitution provides the same protection; thus, the same analysis applies when interpreting the federal and state constitutional provisions. *State v. Oliver*, 293 S.W.3d 437, 442 (Mo. banc 2009).

“Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.” *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978) (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)). “A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by search of a third person’s premises or property has not had any of his Fourth Amendment rights infringed.” *Rakas*, 439 U.S. at 134. Because the exclusionary rule is intended to effectuate the guarantees of the Fourth Amendment, “it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule’s protections.” *Id.*

Although Missouri law ultimately places the burden upon the State to prove that a defendant’s motion to suppress evidence should be overruled (§ 542.296.6), the defendant must first prove as a threshold matter that he was “aggrieved by the search and seizure,” or, in other words, that he had standing to challenge the search. *E.g. State v. Snow*, 299 S.W.3d 710, 714 (Mo. App. W.D. 2009); *see also State v. Simmons*, 955 S.W.2d 729, 736 (Mo. banc 1997) (noting that the defendant could not succeed on a motion to suppress without first establishing standing).⁷ To challenge the admission of evidence as obtained in violation of

⁷ Although the United States Supreme Court has stated that this issue “belongs more properly under the heading of substantive Fourth Amendment doctrine than under the heading of standing,” Missouri courts, including this Court, have continued to use the term “standing” as a shorthand reference in describing whether a defendant is aggrieved by a challenged

the Fourth Amendment, “a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; *i.e.*, one that has a source outside the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.” *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (internal citations omitted). The defendant must have both a subjective and objectively reasonable expectation of privacy in the place searched to invoke Fourth Amendment protection. *See Bond v. United States*, 529 U.S. 334, 340 (2000).

In this case, Defendant failed to prove that he had either a subjective expectation of privacy in the computer he used at work or that any such expectation would have been objectively reasonable. Indeed, Defendant’s theory on appeal—that his consent to search was invalid because he did not own the computer or have actual or apparent authority to authorize the search—in itself shows that he had no subjective expectation of privacy in the computer. *See Snow*, 299 S.W.3d at 714-15 (holding that defendant’s statements disclaiming any ownership or possessory interest in a house supported a finding that he had no subjective expectation of privacy in the property). Defendant focuses on the fact that T-Mobile, not Defendant, owned the computer and only T-Mobile had the authority to consent (STR1 29-31; Tr. 156, 170-74; App. Br. at 62-64). From Defendant’s own evidence and argument, it is apparent that he had no subjective expectation of privacy in T-Mobile’s computer.

search or seizure. *State v. Ramires*, 152 S.W.3d 385, 394 n.3 (Mo. App. W.D. 2004) (citing *Rakas*, 439 U.S. at 140; and *State v. Lane*, 937 S.W.2d 721, 722 (Mo. banc 1997)).

Further, even if Defendant did have a subjective expectation of privacy, he failed to prove that such an expectation was reasonable. Whether an employee may claim an objectively reasonable expectation of privacy in electronic communications conveyed on equipment owned by his employer is an unsettled question, but it appears that the analysis depends heavily on the facts in each individual case. *See City of Ontario v. Quon*, 130 S.Ct. 2619, 2629-30 (2010). In *Quon*, the United States Supreme Court noted that whether an employee had a reasonable expectation of privacy in text messages that he sent using a company phone would depend on such factors as the company's policy, instructions the employee may have received from a supervisor, the extent to which the company equipment may be considered an instrument of self-expression, and the availability of personal, non-company-owned alternatives by which the employee could have communicated. *Id.* Defendant did not present any evidence to suggest that he had a legitimate expectation of privacy in T-Mobile's computer.

Defendant did not meet his burden to prove that he had standing to object to the search of T-Mobile's computer. The trial court did not clearly err in overruling Defendant's motion to suppress the fruits of the search.

2. Prejudice

This Court reviews the trial court's decision to admit evidence for prejudice, not mere error, and will reverse "only if the decision was so prejudicial that it deprived the defendant of a fair trial." *Murrell v. State*, 215 S.W.3d 96, 109-10 (Mo. banc 2007). "Trial court error is not prejudicial unless there is a reasonable probability that the trial court's error affected the outcome of the trial." *Id.* at 110. The erroneous admission of evidence that is cumulative to

other, properly admitted evidence does not result in prejudice sufficient to constitute reversible error. *See State v. Barton*, 240 S.W.3d 693, 706 (Mo. banc 2007) (holding that the defendant could not have suffered prejudice from the allegedly improper admission of identification testimony because the challenged evidence was cumulative to other evidence placing the defendant at the scene of the crime).

Here, there is no reasonable probability that the admission of the evidence obtained from the T-Mobile computer affected the outcome of Defendant's trial. The only evidence presented that came from the computer were "data artifacts" that correlated with the chats between "Kasim786" and "Lilly4U2006" ("Kaitlin's" username) (Tr. 150-54, 157-58). This evidence tended to show that someone using that computer had participated in the chats.

But Defendant's participation in the chats was not in dispute. The State's evidence that he was "Kasim786," the person who chatted with the undercover officer, was overwhelming. Defendant described himself in detail during the chats themselves; then, he showed up in person at the pre-arranged rendezvous (Tr. 110; L.F. 50-51). And he admitted during his trial testimony that he had participated in the chats as "Kasim786" (Tr. 189-90). The information linking Defendant to the chats via the T-Mobile computer was merely cumulative to the other extensive, uncontested evidence that Defendant had taken part in the chats with "Kaitlin." There is no reasonable probability that the outcome of the trial would have been different had the court suppressed the evidence from the T-Mobile computer. Point III should be denied.

CONCLUSION

The trial court did not commit reversible error in this case. Defendant's conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 10,422 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2007 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 15th day of April, 2011, to:

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APPENDIX

Sentence and Judgment	A1
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