

Summary of SC93084, *State of Missouri v. Dennis Blankenship*

Appeal from the St. Louis County circuit court, Judge Colleen Dolan

Argued and submitted October 8, 2013; opinion issued December 10, 2013

Attorneys: Blankenship was represented by Kim C. Freter, a solo practitioner in Clayton, (314) 721-6565; and the state was represented by Jennifer A. Rodewald of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man appeals his conviction for attempted use of a child in a sexual performance. In a unanimous decision written by Judge George W. Draper III, the Supreme Court of Missouri affirms the judgment. The statute is not an unconstitutional restriction of free speech as applied to the man. His speech went beyond fantasy; he attempted to induce a child to engage in a sexual performance. Further, the evidence was sufficient to support his conviction.

Facts: Dennis Blankenship began communicating by electronic mail with a family's teenage daughter after visiting the family in June 2010. One of the e-mails disturbed the daughter, who showed it to her mother, who contacted the police. With the daughter's permission, a police sergeant began posing as the daughter, engaging in extensive e-mail communication with Blankenship. During this communication – which included 67 exchanges between June and September 2010 – Blankenship asked the daughter to perform specific sexual acts, getting more sexually explicit as the communication continued, and to report to him that she had completed these acts. In December 2010, the mother called Blankenship, confronting him about the e-mails and recording the conversation with equipment provided by the sergeant. Blankenship admitted to sending the e-mails, said he probably would have continued even had the daughter's response not been positive, and admitted he asked the daughter to have sex with him the next time he was in Missouri, claiming this was "all fantasy." The police arrested Blankenship, and the state charged him with one count of attempted use of a child in a sexual performance. After finding him guilty, the trial court sentenced him to four years in prison, suspended execution of the sentence, placed him on five years probation and ordered him to serve a 60-day shock incarceration term. Blankenship appeals.

AFFIRMED.

Court en banc holds: (1) The statute under which Blankenship was convicted is not unconstitutional as applied to him. The First Amendment guarantees of free speech forbid states to punish the use of words or language, but this right to free speech is not absolute, and there are certain well-defined and narrowly limited classes of speech, the prevention of which do not raise constitutional problems. Unprotected speech includes the lewd, obscene and profane. This Court has found that it is illegal to engage not only in physical sexual acts of prostitution but also in the negotiations to engage in those acts, holding that, because the words uttered as an integral part of the transaction do not have a lawful objective, they are not entitled to constitutional protection. Similarly, Blankenship's speech was an integral part of his attempt to induce a child for the

purpose of engaging in a sexual performance, which is not a lawful objective. His speech went beyond mere fantasy; he attempted to induce a child to engage in a sexual performance.

(2) There is sufficient evidence to support Blankenship's conviction for attempted use of a child in a sexual performance. The statute does not define "performance," but it has been defined in prior case law using its plain and ordinary meaning as a "presentation ... before an audience." The statute is not limited to visual performances but was enacted to prevent the sexual exploitation of minor children. By inducing the daughter to engage in sexual conduct for his own gratification over a protracted period of time, there is no doubt Blankenship exploited the daughter in the way the legislature tried to prevent. To prove "attempt," the state must prove Blankenship took a substantial step toward completing the commission of the crime of using a child in a sexual performance. Here, the evidence was sufficient to show the substantial step, as Blankenship instructed the daughter on multiple occasions to masturbate, and he coached her how to stimulate herself sexually by touching her body.