IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC97658**
	)	
DUANE MICHAUD,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
THIRTY-FIRST JUDICIAL CIRCUIT
THE HONORABLE THOMAS E. MOUNTJOY, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTION AND STATEMENT

OF FACTS

The Jurisdictional Statement and Statement of Facts from the original brief are incorporated here.

POINTS RELIED ON

I.

REFUSED VERDICT DIRECTOR

INSTRUCTION "A"

The trial court erred in denying the request to submit Verdict Directing Instruction "A," requiring the jury find Duane Michaud knew J.R. was less than fifteen years old, because Duane's knowing J.R. was less than fifteen years old was an element of the offense where §566.151.1 did not prescribe a mental state, and thereby, made the operative mental state knowingly as provided for under §562.021.3.

Alternatively, if this Court determines knowing J.R. was less than fifteen was an affirmative defense, rather than an element, Instruction "A" properly instructed on that affirmative defense because in either instance the jury was called on to decide whether Duane knew J.R. was less than fifteen years old and counsel had no offense specific Notes On Use directing how an affirmative defense was to be drafted for Attempted Child Enticement.

State v. Young, 369 S.W.3d 52 (Mo.App., E.D. 2012);

State v. Westfall, 75 S.W.3d 278 (Mo. banc 2002);

State v. Barton, 552 S.W.3d 583 (Mo.App., W.D. 2018);

Higgins v. Star Electric, 908 S.W.2d 897 (Mo.App., W.D. 1995);

U.S. Const. Amend. XIV;

Mo. Const. Art. I, §10;

§566.151;

MAI-CR3d 320.37.2;

MAI-CR4d 420.62.

III.

LIMITING CROSS-EXAMINATION OF ALISHA BROCK

The trial court abused its discretion in sustaining respondent's objections to cross-examination of Alisha Brock about whether J.R. had a tendency to exaggerate because offers of proof are generally not required as to matters going to cross-examination and from the question posed the record was clear that counsel was looking to Alisha Brock to endorse the view that her sister J.R. was inclined to exaggeration which questioning was not collateral and did not ask Alisha to express a general opinion about J.R.'s credibility. The arguments made here are the same as the record below.

State v. Williams, 724 S.W.2d 652 (Mo.App., E.D. 1986);

U.S. Const. Amends VI;

U.S. Const. Amends XIV;

Mo.Const. Art. I §10;

Mo.Const. Art. I §18(a).

ARGUMENT

I.

REFUSED VERDICT DIRECTOR

INSTRUCTION "A"

The trial court erred in denying the request to submit Verdict Directing Instruction "A," requiring the jury find Duane Michaud knew J.R. was less than fifteen years old, because Duane's knowing J.R. was less than fifteen years old was an element of the offense where §566.151.1 did not prescribe a mental state, and thereby, made the operative mental state knowingly as provided for under §562.021.3.

Alternatively, if this Court determines knowing J.R. was less than fifteen was an affirmative defense, rather than an element, Instruction "A" properly instructed on that affirmative defense because in either instance the jury was called on to decide whether Duane knew J.R. was less than fifteen years old and counsel had no offense specific Notes On Use directing how an affirmative defense was to be drafted for Attempted Child Enticement.

This Court should reverse because the trial court failed to instruct the jury as provided for in Instruction "A" that an element the jury had to find was that Duane knew that J.R. was less than fifteen years old. If this Court concludes such knowledge was an affirmative defense, then Instruction "A" properly instructed on that affirmative defense because the jury had to decide whether Duane knew J.R.'s age

and counsel had no offense specific Notes On Use directing how an affirmative defense was to be drafted for Attempted Child Enticement.[1]

Respondent relies on *State v. Balbirnie*, 541 S.W.3d 702 (Mo.App., W.D. 2018) to assert that knowledge of age appears "in a separate statute," and therefore, Duane having knowledge of J.R.'s age must be an affirmative defense(Resp.Subst.Br.23-24). The knowledge of age factor appears in §566.151, not "a separate statue" and §566.151 provides:

> 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.

Because the age factor appears in §566.151, not "in a separate statute," it is an element of the offense and not an affirmative defense.

The *Balbirnie* decision has no application here as well because of the considerations that are particular to statutory rape. In *Balbirnie*, the defendant was

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[1] As noted in the original brief, the basis for the Point II claim is effectively the same as that presented in Point I as to the Verdict Director. Because of that identity, the detailed Arguments contained in this reply brief as to Point I are equally applicable to Point II for purposes of replying to respondent's brief.

convicted of second degree statutory rape,§566.034.1. *Balbirnie*, 541 S.W.3d at 704-05. Under §566.034.1 second degree statutory rape is committed:

> if being twenty-one years of age or older, he or she has sexual intercourse with another person who is less than seventeen years of age.

Balbirnie argued that respondent failed to prove second degree statutory rape because it did not prove that he knew the victim was under seventeen years old. *Balbirnie*, 541 S.W.3d at 707-08. Balbirnie argued that because §566.034 did not contain a required mental state that under §562.021.3 respondent was required to prove he knew the victim's age. *Balbirnie*, 541 S.W.3d at 709. The *Balbirnie* Court declined to apply §562.021.3 to require knowing the victim's age and instead looked to §562.026(2) which directs that a culpable mental is not required where no mental state is prescribed when

> imputation of a culpable mental state to the offense is clearly inconsistent with the purpose of the statute defining the offense or may lead to an absurd or unjust result.

Balbirnie, 541 S.W.3d at 709-10. The *Balbirnie* Court concluded imputing a culpable mental state under §562.021.3 would lead to an absurd or unjust result because first degree statutory rape is a strict liability offense requiring no mental state, and therefore, second degree statutory rape must also be strict liability. *Balbirnie*, 541 S.W.3d at 709-10.

Duane's case is not one where applying the culpable mental state provision of §562.021.3 would produce an absurd or unjust result. Unlike *Balbirnie*, there is no similar offense history, like a strict liability history framework, to draw from.

The *Balbirnie* Court also pointed to §566.020.2 as supporting its decision because it provides that whenever in Chapter 566 the criminality of conduct depends on a child being less than seventeen years old it is an affirmative defense that the defendant reasonably believed that the child was seventeen years of age or older. *Balbirnie*, 541 S.W.3d at 710-11. Section 566.020.2 has no application for deeming Duane's circumstance as involving an affirmative defense because its reach is limited to statutes within Chapter 566 which by their express terms prohibit acts involving someone "less than seventeen years of age" because other statutes within Chapter 566 prohibit conduct with children of ages twelve, fourteen, and fifteen where the Legislature never intended there to be any affirmative defense to acts involving children of those other ages. Section 566.020.2 (emphasis added) provides:

> Whenever in this chapter the criminality of conduct depends upon a child being **less than seventeen years of age**, it is an affirmative defense that the defendant reasonably believed that the child was seventeen years of age or older.

Section 566.020.2 applies to: (a) §566.071 fourth degree child molestation; (b) §566.064 second degree statutory sodomy; (c) §566.068.1(2) second degree child

molestation; and (d) §566.034 second degree statutory rape because by their express terms they prohibit particularized acts with a child "less than seventeen years of age."

Section 566.020.2 does not apply to: (a) §566.069 third degree child molestation; (b) §566.067 first degree child molestation; (c) §566.032 first degree statutory rape; and (d) §566.062 first degree statutory sodomy because they prohibit acts involving a child "who is less than fourteen years of age" and because these statutes all declare that "[a] person commits" these offenses involving a child "who is less than fourteen years of age." Even though a child who is less than fourteen years old is necessarily also less than seventeen years old, the Legislature never intended for §566.020.2 to create any affirmative defense to these "less than fourteen years of age" offenses, and therefore, §566.020.2's reach has to be limited to statutes where the conduct prohibited involves a child "less than seventeen years of age."

Such a construction is underscored when §566.068, prohibiting second degree child molestation, is considered. Section 566.068 (emphasis added) provides:

> 1. A person commits the offense of child molestation in the second degree if he or she:
>
> (1) Subjects a child **who is less than twelve years of age** to sexual contact; or
>
> (2) Being more than four years older than a child who is **less than seventeen years of age**, subjects the child to sexual contact and the offense is an aggravated sexual offense.

Applying 566.020.2 to all offenses within Chapter 566 would mean that believing a child was greater than twelve years old would constitute an affirmative defense to second degree child molestation under §566.068.1(1) - that is a result the Legislature never intended. That the same offense could involve a child less than twelve years old, as well as child less than seventeen years old, and within the same statute (§566.068) highlights why 566.020.2 must have a limited application within Chapter 566. Section 566.020.2's reach must be limited to statutes where the express statutorily specified prohibited conduct involves a child "less than seventeen years of age" and not twelve or fourteen or **fifteen** years old. Because knowledge of the child being less than fifteen appears in §566.151.1 and not "a separate statute" knowledge of that age is an element and not an affirmative defense.

The Legislature created an affirmative defense, through operation of Section 566.020.2, for: (a) §566.071 fourth degree child molestation; (b) §566.064 second degree statutory sodomy; (c) §566.068 second degree child molestation; and (d) §566.034 second degree statutory rape where the prohibited conduct involved a child "less than seventeen years of age." That the Legislature did not apply the same type of approach for prohibited conducting involving a child "less than fifteen years of age" by having a separately denominated statute that speaks to a child "less than fifteen years of age" means for purposes of §566.151.1 that its age provision must be an element of the offense and not an affirmative defense.

"'Generally, where an exception is part of the section which defines the offense, the burden is on the State to plead and prove that the defendant is not within the exception.'" *Balbirnie*, 541 S.W.3d at 711 (quoting *State v. West*, 929 S.W.2d 239, 242 (Mo. App., S.D. 1996)). Knowledge of age here is an element under §566.151.1 respondent was required to prove. The "fifteen years of age" provision "exception," with its presence in the section which defined child enticement, §566.151.1 means the burden was on respondent to plead and prove Duane was not within the "exception." *See Balbirnie.*

"'However, where the exception is found in a separate clause or part of the statute disconnected from the definition of the offense, the exception is not for the prosecution to negate, but for the defendant to claim as a matter of affirmative defense.'" *Balbirnie*, 541 S.W.3d at 711 (quoting *State v. West*, 929 S.W.2d at 242). Here knowledge of age, less than fifteen years old, is not in a separate clause or part of §566.151, instead it is all in §566.151.1, and therefore, such knowledge was not an affirmative defense.

Even If Knowledge Of Age Was An Affirmative Defense

Instruction "A" Properly Submitted It

Respondent asserts counsel "did not proffer an instruction that submitted knowledge or belief as to age in the proper format for submitting an affirmative defense." (Resp.Subst.Br.25) (citing *State v. Blurton*, 484 S.W.3d 758, 768 (Mo. banc 2016)). In making its argument that Instruction A was not in proper format,

respondent points to MAI-CR4d 420.26 Note on Use 7 (fourth degree child molestation); MAI-CR4d 420.18 Note on Use 4 (second degree statutory sodomy); and MAI-CR4d 420.22 Note On Use 12 (second degree child molestation) and their treatment of instructing on an affirmative defense (Resp.Subst.Br.25). Respondent references the corresponding Notes on Use for those particular offenses which direct that the language "then you will find the defendant guilty (under Count ____)" is to be followed by "unless you find and believe from the evidence that it is more probably true than not true that the defendant reasonably believed [Identify victim.] was seventeen years of age or older at the time of the offense." Respondent also relies on MAI-CR4d 404.11(F) and MAI-CR4d 404.02 for the same proposition(Resp.Subst.Br.25).

The conditions presented by MAI-CR4d 420.26 Note on Use 7 (fourth degree child molestation); MAI-CR4d 420.18 Note on Use 4 (second degree statutory sodomy); and MAI-CR4d 420.22 Note On Use 12 (second degree child molestation) are very different than Duane's because their Notes on Use provide express guidance on how an affirmative defense is to be submitted. In contrast, the Attempted Enticement Verdict Director MAI-CR3d 320.37.2 (currently MAI-CR4d 420.62) has no Notes on Use providing guidance as to how such an affirmative defense of knowing a child was "less than fifteen years of age" was to be submitted.

MAI-CR4d 404.11(F) (emphasis added) is instructive in explaining how counsel arrived at Instruction A's format. MAI-CR4d 404.11(F), in relevant part provides:

> The pattern verdict director forms do not contain a paragraph in parentheses cross-referencing to affirmative defenses. For the method of including the reference to an affirmative defense, see the applicable verdict director and its Notes on Use, the Notes on Use for the affirmative defense, and Notes on Use 13 and 14 to MAI-CR 4th 404.02.

The Attempted Enticement Verdict Director MAI-CR3d 320.37.2 (currently MAI-CR4d 420.62) and MAI-CR4d 404.02 do not contain any fifteen year old directives comparable to "then you will find the defendant guilty (under Count ____)" and followed by "unless you find and believe from the evidence that it is more probably true than not true that the defendant reasonably believed [Identify victim.] was [fifteen] years of age or older at the time of the offense." Counsel should not be faulted for failing to offer a finely crafted affirmative defense alternative that tracks certain language because there was no corresponding MAI format to guide them.

In evaluating a non-MAI instruction, it is to be judged according to whether it clearly communicated a correct characterization of the substantive law and was understandable. *Higgins v. Star Electric*, 908 S.W.2d 897, 906 (Mo.App., W.D. 1995).

In *State v. Young*, 369 S.W.3d 52, 53 (Mo.App., E.D. 2012), the defendant was convicted of first degree assault. The verdict director erroneously instructed the jury with the phrase "acted together with or aided" rather than using the phrase "aided or encouraged." *Young*, 369 S.W.3d at 53. In finding no prejudice, the *Young* Court found that there was no reason to believe that the jurors "drew the fine legal distinction" between the terms, rather the jurors would have treated them as "functionally equivalent." *Young*, 369 S.W.3d at 53, 58. *Cf. Adler v. Ewing*, 347 S.W.2d 396, 402 (St.L. Ct.App. 1961) (civil action for assault and battery where the jury was required to find the acts alleged constituted an "assault" and not "an assault and battery" was not prejudicial because the distinction between the two was "so technical" as not to have influenced the jury's decision). What sets apart the respondent's obligation on the elements of an offense from the defendant's obligation on an affirmative defense is who has the burden of persuasion. *See State v. Barton*, 552 S.W.3d 583, 587 (Mo.App., W.D. 2018). Instruction "A" called on the jury to decide whether Duane knew that J.R. was less than fifteen years old. Who had the burden of persuasion such that the affirmative defense instruction contained language "then you will find the defendant guilty (under Count ____)" followed by "unless you find and believe from the evidence that it is more probably true than not true that the defendant reasonably believed [Identify victim.] was fifteen years of age or older at the time of the offense" is a"fine legal distinction" and a "technical" one that would not have mattered to the jurors in deciding whether or not Duane knew J.R. was less

than fifteen years old. *Cf. Young* and *Adler*. Instead, the critical factor and bottom line was what the jury would have concluded as to Duane's knowledge of whether or not he knew J.R. was less than fifteen years old. That critical factor and bottom line were presented to the jury in Instruction "A." Instruction "A" communicated a correct characterization of the substantive law and was understandable on the question of whether or not Duane knew J.R. was less than fifteen years old. *See Higgins*.

In *Blurton*, (Resp.Subst. Br.25) the defendant's instruction was not in proper form because it violated specific Notes on Use. *Blurton*, 484 S.W.3d at 768. Here, the problem was that the form Attempted Enticement of a Child (MAI-CR3d 320.37.2 and MAI-CR4d 420.62) had no Notes to follow as to an affirmative defense, and therefore, *Blurton* is inapplicable. Counsel should not be faulted for failing to submit an affirmative defense instruction that tracked the way respondent now claims it should have when the applicable Form MAI and Notes did not provide guidance on how to instruct on an affirmative defense.

An affirmative defense can only be submitted to the jury if it is supported by evidence and if it is submitted, the defendant has the burden of persuasion. *Barton*, 552 S.W.3d at 587. An affirmative defense instruction is required to be given if there is some evidence to support it. *State v. Westfall*, 75 S.W.3d 278, 280-81 (Mo. banc 2002). Respondent asserts that Duane would not have been entitled to an affirmative defense instruction because "he did not present any evidence to suggest that he was unaware of [J.R.'s] age or that he reasonably believed her to be seventeen years of age

or older."(Resp.Subst.Br. 24). Respondent asserts for that reason there was no prejudice(Resp.Subst.Br.26). As previously discussed, the "less than seventeen years of age" provision is only operative for the definition of those offenses which use that seventeen years old language. *See* sections discussed, *supra*. Under §566.151.1, the operative age is "less than fifteen years of age." Assuming that knowing the child was "less than fifteen years of age" is an affirmative defense, there was some evidence presented here to support instructing the jury on that affirmative defense. *See Westfall*. Alisha Brock testified that there were times while J.R. stayed with Alisha that Alisha allowed J.R. to drive Alisha's car, while accompanied by Alisha, on the back roads because J.R. was almost 15 years old(Tr.343-44). Defense counsel relied heavily on this evidence to argue that there was no evidence Duane knew that J.R. was under 15 years old(Tr.410-11). Counsel urged that there could not be a "conscious object," as provided for in Instruction 5, where it was not established Duane knew J.R. was less than 15 years old(Tr.411). Counsel urged that there was evidence J.R. was driving a car, and to drive with a learner's permit, you must be 15 years old(Tr.411). Thus, some evidence was presented to support the affirmative defense. *See Westfall*.

This Court should reverse for a new trial at which the jury is properly instructed on the issue of whether Duane knew that J.R. was less than fifteen years old.

III.

LIMITING CROSS-EXAMINATION OF ALISHA BROCK

The trial court abused its discretion in sustaining respondent's objections to cross-examination of Alisha Brock about whether J.R. had a tendency to exaggerate because offers of proof are generally not required as to matters going to cross-examination and from the question posed the record was clear that counsel was looking to Alisha Brock to endorse the view that her sister J.R. was inclined to exaggeration which questioning was not collateral and did not ask Alisha to express a general opinion about J.R.'s credibility. The arguments made here are the same as the record below.

Respondent asserts this claim was not preserved because an offer of proof was not made and the arguments now made were not presented to the trial court(Resp.Subst.Br.30-33). Respondent's arguments should be rejected because offers of proof as to matters of cross-examination are not required and the arguments presented here are the same based on the record below.

J.R. and Alisha Brock are sisters(Tr.313-14). J.R was living with Alisha when the acts at issue were alleged to have happened(Tr.340-41). On cross-examination of Alisha Brock the following occurred:

> Q. Now, going back again to the summer of 2012 when she [J.R.] was staying with you, did she have a tendency at that time to exaggerate --

[THE PROSECUTOR]: I'm going to object. I think this is asking a witness to comment on the credibility of another witness.

THE COURT: Sustained.

[DEFENSE COUNSEL]: I have nothing further.

(Tr.348).

In *State v. Williams*, 724 S.W.2d 652, 656 (Mo.App., E.D. 1986) respondent argued that a claim that the court improperly limited cross-examination was not preserved because the defendant failed to make an offer of proof. That preservation claim was rejected on multiple grounds. Offers of proof are not typically required as to matters going to cross-examination. *Id.* at 656. An offer of proof is not required when it would serve no purpose. *Id.* at 656. Where relevance is clear offers of proof are generally not required when evidence is sought through cross-examination. *Id.* at 656.

Respondent relies on *State v. Hunt*, 451 S.W.3d 251 (Mo. banc 2014) to maintain an offer of proof was required(Resp.Subst.Br.30). Hunt involved a police officer charged with assaulting an arrestee. *Id.* at 263-64. As part of the defense case, Hunt sought to elicit opinion evidence from another police officer that the amount of force Hunt used to make the arrest was reasonable and within police policy. *Id.* at 263-64. Hunt did not involve evidence sought to be elicited on cross-examination, but rather direct examination during the defense case, and therefore, is inapplicable. *Id.* at 263-64.

Respondent also relies on *State v. Hodges*, 529 S.W.3d 28 (Mo.App., S.D. 2017)(Resp.Subst.Br.30). In *Hodges*, the Southern District found a claim as to evidence excluded on cross-examination was not preserved for failing to make an offer of proof. *Hodges*, 529 S.W.3d at 30-31. The Southern District's *Hodges* case was wrongly decided and was based on another Southern District decision. *Hodges*, 529 S.W.3d at 30-31 (citing to *State v. Randleman*, 705 S.W.2d 98, 101 (Mo.App., S.D. 1986)). The decision in *State v. Williams*, 724 S.W.2d 652, 656 (Mo.App., E.D. 1986), *supra*, was clear that offers of proof are not typically required as to matters going to cross-examination. Because the Southern District wrongly decided *Hodges* and the Southern District case that *Hodges* relied on, those Southern District decisions should not be relied on here to find Duane's claim was unpreserved. *See Williams*.

Respondent asserts that counsel's question "was inconsistent with defense counsel's pre-trial statement that he did not object to the State's motion in limine that barred any reference to untruthfulness on collateral issues, or comments on the credibility of a witness. (Tr.19-20)." (Resp.Subst.Br.32). Respondent also asserts that counsel failed to explain why his question was permissible in light of counsel's agreement on respondent's motions in limine and the motion for new trial did not explain "further" why the question was proper(Resp.Subst.Br.32).

Respondent's case was premised on J.R.'s testimony that Duane committed specific acts constituting attempted enticement of a child. J.R. reported that Duane kissed her neck and face multiple times and said multiple times for J.R. to tell him

when to stop(Tr.321-22). J.R. reported that as Duane was kissing her that his hand moved from her torso towards her pant line while telling her to tell him when to stop(Tr.322-23). J.R. testified that when Duane's hand got below her belly button that she nudged his hand away from her(Tr.323). J.R. reported that Duane then tried to put his fingers in her mouth, but she kept her lips closed(Tr.323-24). At that point, J.R. got up and went outside the house(Tr.324).

Counsel's attempted impeachment went to J.R.'s reputation for exaggeration. Casting doubt on J.R.'s credibility by presenting evidence she had a reputation for exaggeration was critical because the jury had to believe the specific details of what J.R. reported Duane did. Such impeachment was not on a collateral matter.

The appellant's substitute brief argued the same grounds counsel presented in the trial record and not something new - that J.R.'s reputation for exaggeration was relevant. Counsel's question asked Alisha whether J.R. was prone "to exaggerate"(Tr.348). Duane's substitute brief argued that counsel should have been allowed to impeach as to J.R.'s reputation for exaggeration. *See* Substitute Brief at 61. The record made at trial and the argument made here are identical and the motion for new trial was not required to offer further explanation for admitting the excluded evidence.

This Court should order a new trial.

CONCLUSION

For all the reasons discussed in the original brief and this reply brief, this Court should order a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, William J. Swift, hereby certify to the following.

The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 4,423 words, which does not exceed twenty-five percent of the 31,000 words (7,750) allowed for an appellant's reply brief.

The brief has been scanned for viruses using a Symantec Endpoint Protection program, which was updated in June, 2019. According to that program the brief is virus-free.

A true and correct copy of the attached brief with brief appendix have been served electronically using the Missouri Supreme Court's electronic filing system this 18th day of June, 2019, on Assistant Attorney General Daniel McPherson at Dan.McPherson@ago.mo.gov at the Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

/s/ William J. Swift
William J. Swift