

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI

**v.
JEFFREY W. DAVIES**

RESPONDENT,

APPELLANT.

DOCKET NUMBER WD70910

DATE: December 14, 2010

Appeal From:

Buchanan County Circuit Court
The Honorable Daniel F. Kellogg, Judge

Appellate Judges:

Division Four: Lisa White Hardwick, Chief Judge, Presiding, Gary D. Witt, Judge, and Hadley Grimm, Special Judge

Attorneys:

Shaun J. Mackelprang and James B. Farnsworth, Jefferson City, MO, for respondent.

Kent E. Gipson, Kansas City, MO and Michael Insko, St. Joseph, MO, for appellant.

MISSOURI APPELLATE COURT OPINION SUMMARY

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v.

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No. WD70910

Buchanan County

Before Division Four Judges: Lisa White Hardwick, Chief Judge, Presiding, Gary D. Witt, Judge, and Hadley Grimm, Special Judge

Jeffrey Davies appeals his convictions, following a jury trial, of one count of enticement of a child, Section 566.151, and two counts of attempted statutory sodomy in the first degree, Sections 566.062, 564.011. The Buchanan County sheriff's department conducted an internet sting operation in which a twenty-six year old college intern posed on internet chat rooms as a minor child. Davies corresponded with this fictitious minor and arranged a meeting. When Davies appeared at the rendezvous point, the sheriff's department apprehended him, which resulted in his conviction. Davies now appeals.

AFFIRMED IN PART; REVERSED IN PART; AMENDED.

Division Four holds:

In Point One, Davies argues the trial court erred in denying his Motion for Judgment of Acquittal because the evidence adduced at trial was legally insufficient to support his conviction under Enticement of a Child, because a necessary element of the crime requires that the enticement be of a person under the age of fifteen. The plain language of the crime of Enticement of a Child, Section 566.151.1, unequivocally requires that the person enticed be less than fifteen years old. Here there was no actual minor under the age of fifteen but a 26 year-old intern posing as a minor. Therefore, there was insufficient evidence in the record to support convicting Davies of enticement of a child under the statute and the instructions submitted to the jury. This conviction was in error. This error, however, does not demand that Davies be discharged because there was sufficient evidence in the record to convict Davies of the lesser-included offense of attempted enticement of a child, and the jury was required to find each element of the lesser-included offense in order to convict Davies of the greater offense.

Point One is granted in part. We reverse the conviction for enticement of a child, and we enter a conviction for the lesser included offense of attempted enticement of a child.

In Point Two, Davies claims the verdict director submitted to the jury on the charge of Enticement of a Child was defective in that it did not conform to MAI-CR3d 320.37.1. Davies's primary objection to the verdict director is its language indicating that Davies only had to believe that the victim was less than fifteen years of age and not that the victim was in fact less than

fifteen years old. This point is now moot because, as discussed above, the verdict director submitted was sufficient in this regard, when read with the other instructions, to find Davies guilty of attempted enticement of a child, which does not require a victim that is actually less than fifteen years old. Although the jury did not explicitly find that Davies took a requisite "substantial step" as required by the MAI attempt instruction with regard to the enticement charge, the jury did explicitly find the substantial step element satisfied for the charge of attempted statutory sodomy. We conclude these same actions constituted a substantial step toward the commission of the crime of attempted enticement of a child. Finally, the State's use of the more narrow term "sexual contact" rather than "sexual conduct" was not prejudicial to Davies in that it placed a higher burden on the State.

Point Two is denied.

In Point Three, Davies argues that the trial court erred in denying his Motion for Judgment of Acquittal on Count I for the offense of enticement of a child because the Fourth Amended Information charging the offense was defective and insufficient as a matter of law because it omitted the statutory element of the offense that the person enticed was underage. The Information at issue was sufficient, in that Davies was put on notice in the charging document that he was charged with enticement of a child. Attempted enticement of a child is a lesser-included offense of enticement of a child. Notice that one is being charged with a greater offense also places that person on notice of possibly being tried and/or convicted of a lesser-included offense. Davies has not demonstrated and the Court cannot see how the State's misclassification of the offense as completed rather than attempted has prejudiced Davies in such a way that he either did not know with what crime he was being charged or was hurt in his ability to prepare his defense.

Point Three is denied.

In Point Four, Davies argues the evidence adduced at trial was insufficient to support his conviction in Counts II and III for attempted statutory sodomy. First, the evidence from trial was sufficient to show that Davies's actions constituted a substantial step toward the completion of the offense of statutory sodomy. This Court, along with others, has repeatedly held that arranging a meeting place for a sexual encounter and arriving there at the prearranged time are sufficient to constitute a substantial step in furtherance of a sex crime against a minor. It was not an unreasonable determination by the jury that Davies's actions, following his on-line conversation with a person whom he believed was a minor, constituted a substantial step as to be corroborative of his criminal intent. Second, the evidence at trial was sufficient to support a finding that Davies acted with the purpose to commit two separate acts of statutory sodomy. The chat transcripts between Davies and the "minor" clearly show that Davies contemplated at least two acts that fall within the definition of "deviate sexual intercourse."

Point Four is denied.

In Point Five, Davies argues the trial court erred in allowing the State to file, over his objection, a Fourth Amended Information after the close of defendant's evidence because the Information charged new and different offenses. Rule 23.08 allows the state to amend the information at any time before verdict or finding if: (a) No additional or different offense is charged, and (b) A defendant's substantial rights are not thereby prejudiced. Here, no additional

or different offense was charged because the elements of the charges before and after amendment were the same. Also, Davies substantial rights were not prejudiced because his planned defense was both available before and after the amendment, and the evidence he presented for his defense was applicable before and after the amendment.

Point Five is denied.

In Point Six, Davies argues the trial court erred when it allowed into evidence at trial testimony from Davies's wife regarding communications between Davies and his wife, which he argues were marital communications and, therefore, privileged. Davies had to establish that the communications were conducted in private for the privilege to apply. Because Davies failed to present any evidence that these conversations were indeed conducted in private, an essential element to establishing the privilege he claims, his point must fail.

Point Six is denied.

In Point Seven, Davies argues the trial court erred when it allowed Davies's wife to testify that Davies never denied the crime to her, because there was no evidence adduced at trial that an incriminating statement was made by his wife in Davies's presence that would trigger the tacit admission rule. The State asked Wife at trial, "At any point in time that you had any conversation with Jeff Davies about the reason he was arrested, did he ever tell you that he thought that person was over the age of 18?" and "Did [Davies] ever say he'd been wrongly accused?" Wife answered "No" to both questions. The tacit admission rule provides that evidence of a failure to respond or acquiescence to an inculpatory statement may be used as evidence against the defendant when three criteria are satisfied: (1) the inculpatory statement must be made in the presence and hearing of the accused; (2) the inculpatory statement must be sufficiently direct, as would naturally call for a reply; and (3) the inculpatory statement cannot have been made at a judicial proceeding, or while the accused was in custody or under arrest. Here, there was no inculpatory statement made in the presence of the accused as would naturally call for a reply. The rule is a narrow one and one we refuse to expand. Admitting the evidence was error. However, the admission of this evidence was not prejudicial because (1) the evidence was cumulative to other admitted evidence, and (2) the presumed prejudice is overcome in this case by overwhelming evidence of Davies's guilt.

Point Seven is denied.

Opinion by: Gary D. Witt, Judge

December 14, 2010

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