NO. SC93084

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,
Respondent,

v.

DENNIS BLANKENSHIP,
Appellant.

Appeal from the Circuit Court of St. Louis County
The Honorable Colleen Dolan

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Appellant was convicted by the Circuit Court after trial of one count attempted use of a child in a sexual performance, Class D felony, under §§564.011 and 568.080 RSMo.[1] The Circuit Court sentenced Appellant to four years in the Missouri Department of Corrections, suspended execution of the sentence, placed him on five years probation and required 60 days shock incarceration as a special condition of probation.

This action is one involving an applied challenge under Article I, §8 of the Missouri Constitution and Amendments I and XIV of the United States Constitution to the validity of §568.080 RSMo. as it statutorily criminalizes constitutionally protected speech. §568.080 RSMo., as applied, violates Appellant's right to speak in a sexually suggestive manner via email with an adult posing as a 16 year old. This action therefore involves the validity of a statute of Missouri in which jurisdiction is proper in this Court under Article V, §3 of the Missouri Constitution.

[1] All statutory references are to RSMo 2010, unless specifically otherwise noted.

STATEMENT OF FACTS

Dennis Blankenship ("Appellant" "Blankenship") appeals the Circuit Court's decision finding him guilty of one count of attempted use of a child in a sexual performance, in violation of §§564.011 and 568.080 RSMO, Class D felony, alleged to have occurred between June 22, 2010 and December 1, 2010. (Legal File "LF" 10, 22-23).

The evidence presented at trial viewed in the light most favorable to the verdict, reflects that on June 23, 2010 at 11:05 a.m. Blankenship emailed his then 16 year-old niece KD.[2] (Trial Transcript "Tr." 16, 20, 21, 30). The email stated, in relevant part, "Do you mind if I flirt with you on the computer? Let me know, Dennis." (Tr. 26). KD responded with an email that stated, "Yeah, no, kind of, LOL." *Id.* Blankenship responded later with an email that stated,

> "Kind of. You kind of don't want me to flirt with you or you kind of do want me to flirt with you? I was thinking of a truth and dare game where you have to tell the truth and do the dare. You answer the question, but you can't just say yes as the answer. You have to explain your answer and perform the dare as though I'm watching you and if you want to ask me a question and dare me then put it at the end of your message and say pass and it will be my turn to ask you again based on your answers. Do

[2] In accordance with §566.266 RSMo. the alleged victim in this case will be referred to by the initials "KD."

you want to play? The questions will get personal and the dares more daring as we go. If you want to play, answer the question at the top and say let's play or take the first turn with a question and a dare. Bye."

(Tr. 27-28, 30). KD testified that she was disturbed by the email and told her mom, Blankenship's sister-in-law, about it. (Tr. 27). KD's mother contacted the police and Sergeant Adam Kavanaugh ("Kavanaugh") thereafter assumed KD's on-line identity. (Tr. 28-29, 35). KD did not have any additional contact with Blankenship. (Tr. 29, 31). KD did not take pictures of herself and send them to Blankenship, engage in "chat" or "instant messaging" with Blankenship, and did not do "face-time" or any other kind of video-chat with Blankenship. (Tr. 31-32).

Kavanaugh, while posing as KD, did engage Blankenship in extensive e-mail communication. (Tr. 38-39, 41). Kavanaugh's first email to Blankenship on July 7, 2010 stated, "Sorry, haven't checked my e-mail in a while. Flirting is kwel (sic) just don't let you know who see it. Who goes first L-O-L." (Tr. 42). Blankenship e-mailed a response the same day stating, in relevant part, "Have you ever kissed a male or female on the lips with your tongue in their mouth or their tongue in your mouth or both. Remember, if the answer is yes, explain your answer. Dare: Your dare is with all your clothes on to take off you (sic) top leaving your bra on. Can you do it with me watching." (Tr. 43). Also on July 7, 2010, Blankenship e-mailed Kavanaugh, in relevant part, "Go to your room and get naked alone. If you do it say, done." (Tr. 43). Blankenship also emailed Kavanaugh, "Now that you are naked take your hands and cup your breasts and squeeze them lightly. Can you do it." (Tr. 43). Another email from July 8 stated, in relevant part, "Dare: Slip

your hands inside your shirt and inside your bra and touch your bare breasts. To answer dare, just say I did it. I won't be on computer much until tonight." (Tr. 44).

Kavanaugh responded to Blankenship's July 7, 2010 ("can you do it with me watching") by stating, "What do you mean watching?" (Tr. 65). Blankenship's next email did not address what "watching" meant. *Id.* Blankenship and Kavanaugh only corresponded with "traditional e-mail" and did not instant message, "Face-Time," "chat," or exchange, or ask to exchange, videos or photographs. (Tr. 65-66, 69). There were often gaps of time between the email exchanges, including on July 8, 2010 when Blankenship wrote that he wouldn't be on the computer much that night and another one where he indicated that he would read the answer and respond the next day. (Tr. 67-68).

At one point in the email exchange, Kavanaugh stated, "You live so far away, how would we ever be able to do that?" (Tr. 70). Blankenship responded, "The distance does make things difficult" but did not make a suggestion or a plan to meet. (Tr. 70). Thereafter, the email exchange ended without any plan to meet in the future. (Tr. 71-72).

KD's mother testified that she had a recorded phone conversation with Blankenship in which told her he sent the emails to KD. (Tr. 92-94). KD's mother also testified that during the time of the events in question, KD was residing in St. Louis County, Missouri and Blankenship was residing in White, Georgia. (Tr. 82).

At the conclusion of the evidence, the Circuit Court overruled Appellant's Motion for Judgment of Acquittal and found Appellant guilty. (Tr. 98, 113). The Circuit Court subsequently sentenced Appellant to four years in the Missouri Department of Corrections, stayed execution of the sentence, and placed Appellant on five years

probation with 60 days shock incarceration. (Tr. 116-117). This appeal follows.

POINTS RELIED ON

I.

The Circuit Court erred in overruling Appellant's objection that §568.080 RSMo., attempted use of a child in a sexual performance, as applied, violated his protected speech rights under U.S. Const. Amend. I and Mo. Const. Art. I, §8. Appellant's email exchange with an officer posing as a 16 year old did not contemplate or solicit a criminal act and was therefore protected speech. The Circuit Court's ruling finding that §568.080 RSMo., as applied, did not impermissibly criminalize Appellant's protected speech was erroneous in that the Appellant's emails constituted mere fantasy speech and the State failed to meet its burden that the speech restriction was constitutionally permissible. The Circuit Court's failure to find that §568.080 RSMo, as applied, violated Appellant's protected speech rights violated Appellant's rights to free speech, to due process of law and a fair trial as guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 8, 10 and 18(a) of the Missouri Constitution.

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

State v. Pribble, 285 S.W.3d 310 (2009).

U.S. Const., Amend. I

Mo. Const. Art. I. §8

II.

The Circuit Court erred in erroneously declaring and applying the law that the exchange of emails between Appellant and an officer posing as a 16 year old constituted a "sexual performance" under §568.080 RSMo., attempted use of a child in a sexual performance. Viewed in the light most favorable to the verdict, Appellant's email exchange with the officer does not meet the definition of "performance" in that the exchange did not constitute a "presentation before an audience." The Circuit Court's finding that the emails and reading of the emails constituted a "presentation" of "sexual conduct" was erroneous in that the emails constituted mere speech and did not meet the statutory requirements necessary to sustain a conviction under §568.080 RSMo. The Circuit Court's erroneous declaration and application of the law regarding "performance" and subsequent finding of guilt violated Appellant's right to due process of law and a fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10 and 18(a) of the Missouri Constitution in that the conduct was not a "performance" and was therefore insufficient as a matter of law to sustain a conviction.

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002)

State v. Butler, 88 S.W.3d 126 (Mo. App. S.D. 2002)

State v. George, 717 S.W.2d 857 (Mo. App. S.D. 1986)

III.

The Circuit Court erred in denying Appellant's Motion for Judgment of Acquittal because the State failed to prove beyond a reasonable doubt that Appellant committed the crime of attempted use of a child in a sexual performance by sending emails to an undercover officer posing as KD requesting that she engage in "sexual conduct." Viewed in the light most favorable to the verdict, there was insufficient evidence from which a reasonable fact-finder could find beyond a reasonable doubt that there was a "substantial step" taken toward the commission of the crime that was indicative of a "purpose" to use of a child in a sexual performance in that there was no evidence presented that Appellant requested that KD undertake any action that would constitute a sexual performance. The Circuit Court's failure to grant Appellant's Motion for Judgment of Acquittal and subsequent finding of guilt violated Appellant's right to due process of law and a fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10 and 18(a) of the Missouri Constitution in that there was insufficient evidence as a matter of law that Appellant committed the crime of attempt to commit use of a child in a sexual performance beyond a reasonable doubt.

State v. Bates, 70 S.W.3d 532 (Mo. App W.D. 2002)

State v. Molasky, 765 S.W.2d 597 (Mo. banc 1989)

State v. Withrow, 8 S.W.3d 75 (Mo. banc 1999)

ARGUMENT

I.

The Circuit Court erred in overruling Appellant's objection that §568.080 RSMo., attempted use of a child in a sexual performance, as applied, violated his protected speech rights under U.S. Const. Amend. I and Mo. Const. Art. I, §8. Appellant's email exchange with an officer posing as a 16 year old did not contemplate or solicit a criminal act and was therefore protected speech. The Circuit Court's ruling finding that §568.080 RSMo., as applied, did not impermissibly criminalize Appellant's protected speech was erroneous in that the Appellant's emails constituted mere fantasy speech and the State failed to meet its burden that the speech restriction was constitutionally permissible. The Circuit Court's failure to find that §568.080 RSMo, as applied, violated Appellant's protected speech rights violated Appellant's rights to free speech, to due process of law and a fair trial as guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 8, 10 and 18(a) of the Missouri Constitution.

Standard of Review

This issue was raised in the Circuit Court and is therefore properly preserved for review. (Tr. 98). This Court reviews constitutional challenges to a statute de novo. *St. Louis County v. Prestige Travel Inc.*, 344 S.W.3d 708, 712 (Mo. banc 2011). "An act of the legislature carries a strong presumption of constitutionality". *Id.* quoting *Ass'n of*

Club Executives v. State, 208 S.W.3d 885, 888 (Mo. banc 2006). "A statute is presumed valid and will not be held unconstitutional unless it contravenes a constitutional provision. *Id.* quoting *Rentschler v. Nixon*, 311 S.W.3d 783, 786 (Mo. banc 2010). The burden of proof rests on the challenger to prove otherwise. *Id.*

Discussion

The First Amendment to the United States Constitution and Article I, §8 of the Missouri Constitution provide that no law abridging the freedom of speech shall be enacted. A law imposing criminal penalties on protected speech is a "stark example of speech suppression." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). The mere "prospect of crime" by itself does not justify laws suppressing protected speech including speech that concerns offensive subjects. *Id.* citing *Kingsley Int'l Pictures Corp. v Regents of Univ. of N.Y.*, 360 U.S. 684, 689 (1959) and *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978).

Content-based restrictions on speech are presumed invalid and the state bears the burden of showing their constitutionality. *United States v. Alverez*, 132 S.Ct. 2537, 2543-44 (2012). However, offers to engage in illegal transactions are categorically excluded from First Amendment protection." *U.S. v. Williams*, 553 U.S.285 (2008). *Williams* specifically held that a prohibition on offers to provide or requests to obtain child pornography were constitutional even if no child pornography actually existed. This Court has also upheld the criminalization of the solicitation of a prostitute as an acceptable limit on speech. *State v. Roberts*, 779 SW2d 576, 579 (Mo. banc 1989). However, the criminalization of Blankenship's speech here constitutes an

unconstitutional abridgment of his protected speech as his emails do not constitute an offer to engage in an illegal transaction.

§568.080 RSMo states, in relevant part, that "[a] person commits the crime of use of a child in a sexual performance, if, knowing the character and content thereof, the person employs, authorizes, or induces a child less than seventeen years of age to engage in a sexual performance." "Sexual performance" is not defined in §568 RSMo. but is defined in §556.061(31) as, "any performance or part thereof, which includes sexual conduct by a child who is less than seventeen years of age." "Sexual conduct" is defined in §566.010(2) as, "sexual intercourse, deviate sexual intercourse or sexual contact." "Sexual contact" is defined in §566.010(3) as any touching of *another person* with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying the sexual desire of any person."[3] Attempt under §564.011 RSMo is when a person, "with the purpose of committing the offense, [he] does any act which is a substantial step towards the commission of the offense."

§568.080 RSMo and §564.011 RSMo together would therefore prohibit a substantial step toward inducing a child under 17 to engage in a "performance" involving "sexual contact" with another person. Facially, §569.080 RSMo survives First

[3] This is a different definition than the §556.061(29) and (30) definitions of "sexual conduct" and "sexual contact" which apply to the touching of *any* (rather than another) person, including for human masturbation.

Amendment analysis in that it would prohibit, for example, an adult from taking a substantial step toward inducing a child to engage in the making of a "sex tape." That request, similar to the solicitation of a prostitute, would not be protected speech.

However, in this case, Blankenship's emails are constitutionally protected "fantasy" speech that did not request that KD engage in any illegal act. Blankenship's emails requested that KD engage in sexual acts by herself but not that she "perform" or put on a "presentation" in any way. If §569.080 RSMo prohibits an adult from sending emails to a person he believes to be 16 requesting private, sexual activity without more, then the statute violates U.S. Const. Amend. I and Mo. Const. Art. I, §8 as applied to Appellant.

Blankenship's emails do not request or contemplate an illegal act. Blankenship's emails do not request a "performance" in that they do not ask that KD, or the officer posing as KD, create or send any media, internet "chat," speak on the phone, or that in that the sexual activity in anyway coincide with Blankenship's emails. (Tr. 31-32, 65-66, 69). Rather the emails were sent and received after a significant delay, in the same fashion as correspondence sent through traditional mail therefore there was no presentation or performance before an audience. (Tr. 67-68). Further, the Circuit Court found that §569.080 RSMo. prohibits the "reading" of emails that contain sexual language. This criminalization of the passive "reading" of emails impermissibly regulates speech contravening the protections afforded by U.S. Const. Amend. I and Mo. Const. Art. I, §8 as applied to Appellant.

This Court has found that "enticement of a child" under §566.151 RSMo does not violate Constitutional speech protections in the legislature specifically criminalized words via the internet that persuade any person under fifteen for the purpose of engaging in sexual conduct. *State v. Pribble*, 285 S.W.3d 310 (2009). This Court found that §566.151 RSMo does not criminalize fantasy speech, "which by definition is not for the purpose of actually engaging in the imagined conduct." *Id.* at 316. This Court held that the words in *Pribble* were "an integral part of the attempt to lure a child for the purpose of engaging in sexual activity; unquestionably, [this is] not a lawful objective." *Id.* citing *Roberts*, 779 S.W.2d at 579 and *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000).

However, §569.080 RSMo, as applied here, punishes Blankenship for mere fantasy speech. The words uttered here are not an integral part of an attempt to lure KD into engaging in a sexual performance as there is no request, or attempt at a request, to "perform." Blankenship's emails do not request or contemplate that KD commit an act that would be a crime. Blankenship's emails "request" that KD whom he believed to be 16, act out sexually, in the privacy of her own bedroom without anyone present, listening or watching. Blankenship does not ask for any video or audio recording of the events. Blankenship's emails do not contemplate any crime as it is not illegal to request that someone over the age of fifteen engage in private, sexual activity.

Additionally, the Circuit Court found that Blankenship was "an audience of one by reason of *reading* the emails purportedly sent by KD." (emphasis added)(LF 23). This application of §568.080 RSMo violates the First Amendment as applied to Appellant.

The regulated harm is in the alleged inducement to engage in the performance, not the response responsive emails. Whether the purported minor agrees to the performance or not is irrelevant as it relates to the crime charged. §568.080 RSMo. is designed to regulate Blankenship's conduct, not KD's. Blankenship's right to review content-neutral emails which were generated by an adult posing as a minor is protected by U.S. Const. Amend, I and XIV and Mo. Const. Art. I, §8.

The Circuit Court's holding that §568.080 RSMo. as applied did not violate Appellant's rights under as guaranteed by U.S. Const. Amend. I and XIV and Mo. Const. Art. I, §8 is therefore erroneous. Appellant's active conduct of writing emails constituted protected speech that was not a solicitation for an illegal act. Appellant's passive conduct of reading the emails from the officer is also protected "speech." Appellant's conviction should therefore be reversed and Appellant ordered discharged.

II.

The Circuit Court erred in erroneously declaring and applying the law that the exchange of emails between Appellant and an officer posing as KD constituted a "sexual performance" under §568.080 RSMo., attempted use of a child in a sexual performance. Viewed in the light most favorable to the verdict, Appellant's email exchange with the officer does not meet the definition of "performance" in that the exchange did not constitute a "presentation before an audience." The Circuit Court's finding that the emails and reading of the emails constituted a "presentation" of "sexual conduct" was erroneous in that the emails constituted mere speech and did not meet the statutory requirements necessary to sustain a

conviction under §568.080 RSMo. The Circuit Court's erroneous declaration and application of the law regarding "performance" and subsequent finding of guilt violated Appellant's right to due process of law and a fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10 and 18(a) of the Missouri Constitution in that Appellant's conduct was not a "performance" and was therefore insufficient as a matter of law to sustain a conviction.

Standard of Review

This issue was raised in the Circuit Court and is therefore properly preserved for review. (Tr. 98). Construction of a statute is a question of law. *State v. Perry*, 275 S.W.3d 237 (Mo. banc 2009). This Court reviews questions of law de novo. *Id.* and *State v. Craig*, 287 S.W.3d 676 (Mo. banc 2009).

Discussion

§568.080 RSMo states, in relevant part, that "[a] person commits the crime of use of a child in a sexual performance, if, knowing the character and content thereof, the person employs, authorizes, or induces a child less than seventeen years of age to engage in a sexual performance." "Sexual performance" is not defined in §568 RSMo. but is defined in §556.061(31) as, "any performance or part thereof, which includes sexual conduct by a child who is less than seventeen years of age." "Sexual conduct" is defined in §566.010(2) as, "sexual intercourse, deviate sexual intercourse or sexual contact." "Sexual contact" is defined in §566.010(3) as any touching of *another* person with the genitals or any touching of the genitals or anus of another person, or the breast of a

female person, or such touching through the clothing, for the purpose of arousing or gratifying the sexual desire of any person." (emphasis added). "Attempt," under §564.011 RSMo. is when any person, "with the purpose of committing the offense, [he] does any act which is a substantial step towards the commission of the offense."

The Circuit Court here erroneously found that the email exchange constituted a "sexual performance" under §568.080 RSMo. (LF 22-23). The Court's decision was in error as the actions in this case do not meet the definition of "performance." In *State v. George*, 717 S.W.2d 857 (Mo. App. S.D. 1986), the court utilized a dictionary definition of "performance" finding "performance" means "a presentation, especially a theatrical one, before an audience." The court held that §568.080 RSMo sought, "to prohibit the exploitation of minors under seventeen in pornographic *presentations* for any reason."(emphasis added) *Id.* at 859. In *State v. Butler*, 88 S.W.3d 126 (Mo. App. S.D. 2002), the court found that a "sexual performance" occurred when the defendant listened over the phone to a child perform the sexual acts he requested.

The Circuit Court here did not expand the definition of "performance" beyond "presentation" as used in *Butler* and *George*. Instead, the Circuit Court focused on the definition of "audience." (LF 22-23). The Circuit Court found that an "audience" is "a reading, viewing, or listening public," Merriam-Webster On-Line Dictionary; "the readership for printed matters, as for a book," American Heritage Dictionary of the English Language; and "the people giving attention to something" Oxford Dictionaries." (LF 23). The Circuit Court found that the "[d]efendant was audience of one by reason of reading the emails purportedly send by KD to him in response to his own." *Id.*

The Circuit Court's emphasis on "audience" rather than on "performance" is misplaced. Blankenship was charged with sending the emails, not receiving them. (LF 10). The Circuit Court's reasoning designating the "audience" as the "reader" rather than the "writer" transforms the emails from Kavanaugh, rather than Blankenship, into the "performance." This reasoning would criminalize a request that a minor *write* emails rather than participate in sexual contact. This would be analogous to *Butler* if that defendant had requested that the victim tell him sexual things over the phone, rather than act them out. There is a difference in the law between a minor *saying or writing things* and a minor *doing* things of a sexual nature. "Sexual conduct" is defined in §566.010(3) as any touching of *another person* with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying the sexual desire of any person." "Sexual conduct" is not defined anywhere in Missouri statutes as re-telling, speaking or writing about sexual events, particularly when those events do not occur with another person. Typing an email, regardless of the content, is not "sexual conduct" under the statute.

"Performance" therefore encompasses something more than mere words. Child pornography is illegal because of the state's interest in protecting the children exploited by the production process. See *N.Y. v. Feber*, 458 U.S. 747 (1982). However, computer generated representations of children, as well as the accompanying descriptions, are not illegal. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). §568.080 RSMo seeks to protect minors from engaging in the sexual acts with others, not merely

discussing them. Therefore, regardless of whether Blankenship is an "audience" of one or not, the sending or receiving of sexually explicit emails, without a request to engage in a "presentation," does not constitute a "performance" under §568.080 RSMo as a matter of law.

The Circuit Court's holding that the exchange of emails, particularly the reading of the emails, constituted a "sexual performance" under §568.080 RSMo was erroneous as a matter of law. The Circuit Court's finding violated Appellant's rights to a fair trial and due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §10 and 18(a) of the Missouri Constitution. The Circuit Court's decision should therefore be reversed and Appellant ordered discharged as the evidence is therefore insufficient to maintain the conviction.

III.

The Circuit Court erred in denying Appellant's Motion for Judgment of Acquittal because the State failed to prove beyond a reasonable doubt that Appellant committed the crime of attempted use of a child in a sexual performance by sending emails to an undercover officer posing as KD requesting that she engage in "sexual conduct." Viewed in the light most favorable to the verdict, there was insufficient evidence from which a reasonable fact-finder could find beyond a reasonable doubt that there was a "substantial step" taken toward the commission of the crime that was indicative of a "purpose" to use of a child in a sexual performance in that there was no evidence presented that Appellant requested that

KD undertake any action that would constitute a sexual performance. The Circuit Court's failure to grant Appellant's Motion for Judgment of Acquittal and subsequent finding of guilt violated Appellant's right to due process of law and a fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10 and 18(a) of the Missouri Constitution in there was insufficient evidence as a matter of law that Appellant committed the crime of attempt to commit use of a child in a sexual performance beyond a reasonable doubt.

Standard of Review

This issue was raised in the Circuit Court and is therefore properly preserved for review. (Tr. 99-100). The standard of review in in a court-tried case is the same as in a jury-tried case. *State v. Craig*, 287 S.W. 3d 676, 681 (Mo. banc. 2009). On a claim of insufficiency of the evidence after trial, this Court views the evidence and all reasonable inferences in the light most favorable to the verdict. *State v. Grim*, 854 S.W.2d 403, 405 (Mo. banc. 1993); *State v. Jackson*, 703 S.W.2d 30, 31 (Mo. App. E.D. 1985). The test is whether there is enough evidence from which a reasonable juror could find each element of the crime beyond a reasonable doubt. *Id.* On review, even though the State is given the benefit of the doubt, the Court will not "supply missing evidence or give the State the benefit of unreasonable, speculative or forced inferences." *State v. Montgomery*, 64 S.W.3d 328 (Mo. App. E.D. 2001) *citing State v. Whalen*, 49 S.W. 3d 181, 184 (Mo. banc 2001). Instead, the Court will draw inferences that are logical, reasonable and from established fact. *State v. Taylor*, 126 S.W.3d 2 (Mo. App. E.D. 2003). If the State fails

to meet its burden of proof on each and every element of the offense, this Court must reverse the trial court's judgment. *Id.*

Discussion

A person is guilty of attempt to commit an offense when, "with the purpose of committing the offense, he does any act which is a substantial step towards the commission of the offense." §564.011 RSMo. A "substantial step" is "conduct which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense." *Id*. Thus, an attempt charge under §564.011 RSMo has two elements: (1) the defendant's purpose to commit the underlying offense, and (2) the defendant's doing of an act which constitutes a substantial step toward the commission of that offense. *State v. Withrow*, 8 S.W.3d 75, 78 (Mo. banc 1999).

In the light most favorable to the verdict, the Circuit Court convicted Blankenship as charged, with requesting that, "the undercover officer, assuming the identity of a child under seventeen years of age engage in sexual conduct and that such conduct was a substantial step toward the commission of the crime of use of a child in a sexual performance." (LF 10, 22-23). Therefore, evidence sufficient to sustain a conviction would have been that Blankenship's emails constituted a "substantial step" with the purpose to use KD in a sexual performance. However, Blankenship's emails demonstrate that he had no intent or purpose to use KD in a sexual performance. Instead, Blankenship engaged in fantasy speech that did not constitute a substantial step toward the commission of any crime.

"What act or conduct will constitute a substantial step will depend on the facts of the particular case." *State v. Molasky*, 765 S.W.2d 597, 601 (Mo. banc 1989). "Substantial step is evidenced by actions indicative of purpose, not mere conversation standing alone." *Id.* at 602 and *State v. Bates*, 70 S.W.3d 532, 537 (Mo. App W.D. 2002). In *Bates*, as in this case, the defendant sent sexually explicit written correspondence to the victim. *Id.* The defendant in *Bates* further sent instructions to his victim and made a specific plan as to what he was going to do upon his release from prison. *Id.* at 536-537. Nevertheless, the court found correspondence insufficient to establish a substantial step toward the commission of statutory rape. *Id.* The court found that even though the defendant's correspondence was distasteful, there was insufficient evidence that he undertook any action toward the completion of the offense.

Blankenship's actions fail to establish a substantial step toward the commission of use of a child in a sexual performance. Blankenship did not ask for Kavanaugh to produce or send any sexually explicit media, such as photographs or recordings. (Tr. 66-69). Blankenship's actions and conversation did not reflect or indicate in any way that he was intending to view or listen to KD engage in a sexual act with another person. Blankenship did not act on any of the fantasies that he wrote about and in fact, ended the email correspondence without taking any action to observe KD in any way. (Tr. 71-21). Instead, Blankenship's email correspondence was no more than fantasy speech without anything corroborative of his purpose to have KD undertake any performance, presentation or sexual contact with another.

The Circuit Court's finding that Blankenship's emails were a substantial step toward the completed act of use of a child in a sexual performance was erroneous. Blankenship failed to take any action that was strongly corroborative of a purpose to use KD in a sexual performance and as such the Circuit Court's finding of guilt fails as a matter of law. The Circuit Court's error in overruling Appellant's Motion for Judgment of Acquittal and subsequent finding of guilt violated Appellant's rights to due process of law and a fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 2, 10 and 18(a) of the Missouri Constitution.

CONCLUSION

The Court should reverse the decision of the Circuit Court finding that §568.080 RSMo is unconstitutional as applied to the speech in this case, that there was a "performance" and that Appellant made an "attempt" at violating the statute as failed to take a "substantial step" toward the commission of a crime and order Appellant discharged.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I do hereby certify that the attached brief complies with Rule 84.06(b) and contains 5,403 words, excluding the cover, the table of contents, the table of authorities, this certification, the signature block, and appendix, as counted by Microsoft Word; that the electronic copy of this brief was scanned for viruses and found to be virus free; and that the notice of this brief, along with an electronic copy of this brief, was sent through the Court's electronic filing system on this 11th of June, 2013 to:

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Respectfully Submitted,

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