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 REPLY BRIEF

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JURISDICTIONAL AND FACT STATEMENTS

Appellant adopts the Jurisdictional Statement and Statement of Facts from his initial Brief.

ARGUMENT[1]

I. §568.080 RSMo. is unconstitutional as applied to Appellant in this case

Standard of Review

Appellant contends that §568.080 RSMo. violates his First Amendment Rights *as applied* to him in this case. Appellant does not claim, as the State suggests, that the statute on its face is unconstitutional. (Resp. Br. 12). Missouri Supreme Court Rule 24.04 proscribes that "objections based on defects in the institution of the prosecution or indictment…may be raised only by motion before trial." The face of the Indictment here appears to be constitutional. (LF 10). Appellant does not make a statutory "void for vagueness" claim as in *State v. Faruqi*, 344 S.W.3d 193 (Mo. banc 2011). Instead, Appellant's *as applied* claim relates specifically to the facts and conduct in this case as reflected in the trial evidence. Appellant's First Amendment claim was therefore only cognizable after the evidence was adduced. The Circuit Court would have been unable to make a pre-trial determination as to Appellant's constitutional claim until it had reviewed the evidence that was ultimately admitted at trial. Appellant's constitutional claim was therefore presented at the first relevant, available opportunity – at the close of the State's case-in-chief. Additionally, the State failed to make any objection to the timeliness of Appellant's constitutional claim and the Circuit Court considered the issue as one

[1] Appellant maintains each of the arguments presented in his initial Brief. Pursuant to Missouri Supreme Court Rule 84.04(g) only those arguments to which he finds it necessary to reply are contained herein.

litigated by consent. See this Court's opinion in *Bone v. Director of Revenue*, SC93047, issued July 16, 2013. Therefore, Respondent's present objection to the timeliness of the argument was waived at the Circuit Court.

Definition of "Sexual Performance"

This Court should attempt to give effect to legislative intent as reflected in the plain language of a statute. *State v. Salazar*, 236 S.W.3d 644, 646 (Mo. banc 2007). This Court should give meaning to every word or phrase of legislative enactment. *Winfrey v. State, 242 S.W.3d 237, 725* (Mo. banc 2008). Here, the legislature did not define "sexual performance" for purposes of Section 568. The Circuit Court used the "plain and ordinary" meaning of the word "performance" and defined it as a "presentation…before an audience" and defined "audience" as a "*reading*, viewing, or listening public." (emphasis added by the Circuit Court) (LF 22-23).

Respondent encourages this Court to utilize a definition of "sexual performance" by applying the definition of "sexual performance" and "sexual conduct" from §556.061 RSMo. which would include acts of masturbation. (Resp. Br. 15-16). Under Respondent's theory, someone, such as a sexual education teacher, who requested or instructed a person under 17 years old to privately masturbate would therefore be guilty of attempted use of a minor in a "sexual performance." This is clearly not the legislative intent of §568.080 RSMo. relative to "sexual performance." The criminalization of "sexual performance" must include something more than a description of masturbation coupled with a request to report if it was accomplished.

The definition of child pornography found in §573.010(2)(a) RSMo delineates that sexual conduct, sexual contact and sexual performance are separate and distinct activities. §573.010(13) further defines "performance" as "any play, motion picture film, videotape, dance or exhibition *performed* before an audience of one or more." (emphasis added). To be a performance, the action, the sexual act, must be before a person other than the actor (an audience) otherwise there is no display, no performance and no crime.

The Circuit Court's inclusion of the word "reader" into the definition of "audience" is therefore misplaced as it relates to the crime of attempted use of a child in a sexual performance. This definition would necessitate that Appellant was the audience by virtue of his reading the emails sent by the officer. Under this theory, Appellant's criminal action would be a request that a minor write sexual emails for his review as an "audience." The writing of sexual emails by a minor does not fit any definition, plain or otherwise, sexual performance. Therefore the criminal act has to be the "request" as sent, rather than as received, via email. Appellant's request, that the officer privately engage in masturbation, does not constitute a performance as he did not view or listen to the sexual activity. Appellant also did not "read" any sexual description of the activity as the officer responded merely with the word "done" rather than a detailed description of any purported masturbation.

Respondent's argument that Appellant was sexually gratified by reading the officer's emails supports Appellant's contention his conduct was fantasy speech. (Resp. Br. 18-19). Respondent acknowledges that it was Appellant's imagination of the officer's actions, rather than actually viewing or listening to them, that was the crux of the case.

Id. However, Appellant's fantasies and imagination are protected speech and cannot be criminalized by attempting to apply §568.080 to these facts.

Appellant's conviction, if allowed to stand, would violate his First Amendment right to engage in fantasy speech as he was not an "audience" for any sexual activity. Any request by Appellant to have the undercover officer type "done" so that he could read it later is not a request for sexual conduct. Additionally, any conviction of Appellant for reading the word "done" or requesting that the officer type the word "done" also violates Appellant's First Amendment Rights and is insufficient to sustain his conviction as a matter of law.[2] As the State has failed to carry its burden that this content based restriction on speech passes constitutional muster, Appellant's conviction should be reversed and he should be discharged.

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.

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[2] *See* App. Br. Points II and III for the arguments that there was insufficient evidence as a matter of law to sustain the conviction in that there was no "performance" and there was no "substantial step" made toward a "performance."

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I do hereby certify that the attached reply brief complies with Rule 84.06(b) and contains **1,119** words, excluding the cover, 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 17th of September, 2013 to:

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