No. SC93084

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

DENNIS BLANKENSHIP,

Appellant.

Appeal from the St. Louis County Circuit Court
Twenty-First Judicial Circuit
The Honorable Colleen Dolan, Judge

RESPONDENT'S BRIEF

CHRIS KOSTER
Attorney General

JENNIFER A. RODEWALD
Assistant Attorney General
Missouri Bar No. 64236

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-1626
Fax: (573) 751-5391
Jennifer.Rodewald@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

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STATEMENT OF FACTS

This is an appeal from a St. Louis County Circuit Court judgment convicting Dennis Blankenship ("Defendant") of one count of attempted use of a child in a sexual performance (§ 568.080, RSMo 2000). (L.F. 10-11). Defendant waived jury trial and was tried by the Honorable Colleen Dolan. (L.F. 5-6). Viewed in the light most favorable to the verdict, the evidence presented at trial showed:

Defendant is Victim's uncle by marriage. (Tr. 16-17, 82-83). Defendant, Victim's aunt, and Victim's cousin lived in White, Georgia, but visited Victim's family in Missouri approximately once a year. (Tr. 17, 82-83). In mid-June of 2010, Defendant, Defendant's family, and Victim and her family visited some relatives in Sullivan, Missouri. (Tr. 17-18, 83). While there, Victim gave her e-mail address ("JK1whitetiger@aol.com") to Defendant's daughter. (Tr. 20, 21, 23).

On June 23, 2010, Defendant sent Victim an e-mail, asking Victim if "JK1whitetiger@aol.com" was her personal e-mail address and assuring her that "Dblankenship1@msn.com" was his e-mail address to which he alone had access. (Tr. 25-26, Ex. 2A). Victim e-mailed Defendant back, confirming that it was her e-mail address. (Tr. 26, Ex. 2A). The next day, Defendant emailed Victim again and asked, "Do you mind if I flirt with you on the

computer? Let me know[.]" (Tr. 26, Ex. 2A). Victim responded, "Yeah, No, kind of, L[augh] O[ut] L[oud]." (Tr. 27, Ex. 2A). On June 25, Defendant sent the following response:

> 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 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, Ex. 2a). This e-mail disturbed Victim, and Victim thought it was inappropriate, so she showed the email to her mother ("Mother"). (Tr. 28).

Mother contacted the police about Defendant's e-mails, and she was put in touch with Sergeant Adam Kavanaugh of the St. Louis County Police Department. (Tr. 87, 33-34). Sgt. Kavanaugh was the supervisor of the

Special Investigations Unit. (Tr. 33-34). With Victim's permission, Sgt. Kavanaugh assumed Victim's e-mail address and began corresponding with Defendant as though Sgt. Kavanaugh were Victim. (Tr. 35. 29).

Defendant and Sgt. Kavanaugh (posing as Victim) traded a series of e-mails wherein Defendant told Victim to perform certain sexual acts, and Sgt. Kavanaugh (posing as Victim) responded that Victim had completed the acts. (Tr. 42-49, Ex. 2B). Between July 7 and 8, 2010, Defendant and Sgt. Kavanaugh (posing as Victim) exchanged 36 e-mails. (Ex. 2B). Defendant began by daring Victim to remove her shirt and asked if she could perform the dare with Defendant watching. (Tr. 43; Ex. 2B, e-mail dated 7/7/10 at 9:04 p.m.). After Sgt. Kavanaugh responded by asking what Defendant meant by doing it with him watching, Defendant dared Victim to remove all of her clothing and to inform him when she completed the dare. (Ex. 2B, e-mails dated 7/7/10 at 9:31 p.m. and 9:42 p.m.). Sgt. Kavanaugh responded as Victim, saying she had completed the dare. (Ex. 2B, e-mail dated 7/7/10 at 9:47 p.m.).

Defendant responded to Victim's apparent completion of the previous dare by instructing her to cup her breasts and squeeze them. (Ex. 2B, e-mail dated 7/7/10 at 9:51 p.m.). When Victim responded that she had already put her clothes back on, Defendant stated, "If you ask I'll tell you what you did to

me when you said you were naked and what I'm doing right know [sic]. [B]e warned it [sic] naughty[.]" (Ex. 2B, e-mail dated 7/7/10 at 10:02 p.m.). Sgt. Kavanaugh asked Defendant what he was doing, and Defendant responded:

> [Y]ou made something grow between my legs. I took off my pants to see what happened. My penis is hard and I started to rub it then stroke it up and down. I am going to cum soon. W[]ould you like to watch me mast[u]rbate? If you say yes I'm going t[o]go all over myself.

(Ex. 2B, e-mail dated 7/7/10 at 10:12 p.m.). Sgt. Kavanaugh asked how Victim could see Defendant masturbate, and Defendant responded, "It may have to actually wait until my next trip to Missouri. I'll talk detail after your answer." (Ex. 2B, e-mail dated 7/7/10 at 10:18 p.m.).

The next day, Defendant began e-mailing Victim at 9:43 a.m. (Ex. 2B). Defendant began by instructing Victim to put her hand inside her shirt and touch her bare breast, and to respond that she followed his instructions. (Ex. 2B, e-mail dated 7/8/10 at 9:43 a.m.). At 12:15 p.m., Sgt. Kavanaugh responded that she had completed the dare. (Ex. 2B). In the next series of e-mails, Defendant instructed Victim to put her hand on the inside of her thigh, place her hand between her legs outside her clothing, take her pants off and "rub [her]self on top of [her] panties," and to "slip [her] hand inside [her]

panties and rub [herself]." (Ex. 2B, e-mails dated 7/8/10 at 8:20 p.m., 8:40 p.m., 8:57 p.m., and 9:06 p.m.). After each of these e-mails, Sgt. Kavanaugh responded "done." (Ex. 2B, e-mails dated 7/8/10 at 8:28 p.m., 8:40 p.m., 8:59 p.m., and 9:12 p.m.). Defendant then twice told Victim to place her finger inside her "pussy." (Ex. 2B, e-mails dated 7/8/10 at 9:21 p.m. and 9:37 p.m.). After Sgt. Kavanaugh responded "done," Defendant indicated that he was going to go to bed to "finish mast[u]rbating thinking about [Victim] touching [herself]," and instructed Victim to masturbate while thinking of him and to tell him about it the next day. (Ex. 2B, e-mail dated 7/8/10 at 10:04 p.m.). Sgt. Kavanaugh responded three minutes later, saying, "done." (Ex. 2B, e-mail dated 7/8/10 at 10:07 p.m.).

In another e-mail, Defendant stated, "That makes me want to mast[u]rbate. Did you know that I mast[u]rbate thinking about you and the things I want to do to and with you?" (Ex. 2B, e-mail dated 7/31/10 at 9:30 p.m.). Defendant also sent Victim two e-mails containing sexually explicit stories. (Ex. 2B, e-mails dated 7/13/10 at 9:03 p.m. and 7/14/10 at 8:55 p.m.). On July 18, Defendant dared Victim to lick her nipples, and asked Victim if she would rub his penis until he ejaculated. (Ex. 2B, e-mail dated 7/18/10 at 4:29 p.m.). Defendant also asked Victim if she would like to practice giving oral sex on him, and if she would let Defendant see her naked and watch her

masturbate. (Ex. 2B, e-mails dated 7/22/10 at 7:30 a.m. and 7:59 p.m.). On July 26, Defendant instructed Victim to "touch [her]self[,] give [her]self pleasure[,] and as [her] pussy g[o]t wet[,] put [her] fingers in side [sic] then pull them out and place them in [her] mouth." (Ex. 2B, e-mail dated 7/26/10 at 7:46 p.m.). Sgt. Kavanaugh responded by saying "done." (Ex. 2B, e-mail dated 7/26/10 at 10:29 p.m.).

On September 7, 2010, Defendant told Victim to touch her nipples with her fingers and squeeze them. (Ex. 2B, e-mail dated 9/7/10 at 6:17 p.m.). Posing as Victim, Sgt. Kavanaugh responded, telling Defendant she would do that for him. (Ex. 2B, e-mail dated 9/8/10 at 4:58 p.m.). Defendant asked Victim if she wanted to masturbate him, and told Victim that he might show her his penis sometime. (Ex. 2B, e-mails dated 9/16/10 at 7:19 p.m. and 9/23/10 at 4:38 p.m.). In his final e-mail, Defendant told Victim he would show her his penis the next time he sees her, and he told her he wanted to see her naked body. (Ex. 2B, e-mail dated 9/26/10 at 7:48 a.m.).

In total, Defendant sent Victim 67 e-mails between June 22, 2010 and September 26, 2010. (Exs. 2A, 2B). On December 1, 2010, Mother called Defendant and confronted him about the e-mails. (Tr. 88-90, Ex. 4). Sgt. Kavanaugh gave Mother recording equipment, and she recorded the phone call. (Tr. 89, Ex. 4). Defendant admitted to sending the e-mails and explained

that he just wanted to "shock" Victim because he "thought [Victim] ha[d] always been a little more sexual for her age than she should be." (Tr. 92). Defendant stated that sending and receiving the e-mails "was a sexual release for [Defendant]," and "it was sexually exciting that someone – someone was giving [him] a positive." (Ex. 4, p. 3). Defendant further stated that if Victim had given a "negative" response, then he would have "kicked in and . . . probably wouldn't have stopped." (Ex. 4, p. 3). Defendant admitted that in the e-mails he asked if the next time he came to Missouri, Victim would have sex with him, but he claimed it was "all fantasy." (Ex. 4, p. 4). Defendant told Mother he stopped sending the e-mails because he felt guilty after becoming "addicted" to sending the e-mails and receiving the "positive" responses. (Ex. 4, p. 8, 4).

The court found Defendant guilty of attempted use of a child in a sexual performance and sentenced Defendant to a term of four years' imprisonment, suspended execution of the sentence, placed Defendant on five years' probation, and ordered Defendant to serve a sixty-day shock incarceration term. (Tr. 113, 116-17).

ARGUMENT

I. (constitutionality)

Section 568.080, RSMo 2000, was not unconstitutional as applied to Defendant in that Defendant's speech was not protected as it was an integral part of his criminal conduct (responds to Defendant's Points I and II).

A. The record pertaining to this claim.

Defendant first raised the issue of the constitutionality of section 568.080 in his motion for judgment of acquittal at the close of the State's evidence. (Tr. 96-103). The court reserved ruling on the motion, and the case proceeded to closing arguments. (Tr. 105).

The court denied Defendant's motion for judgment of acquittal and found Defendant guilty of attempted use of a child in a sexual performance. (L.F. 22-23). In its verdict, the court rejected Defendant's argument that section 568.080 was unconstitutional as applied to him. (L.F. 22-23). The court stated: "The State's evidence showed that each time "[Victim]" responded to [D]efendant that she had performed the act she was dared to perform, [D]efendant dared her to perform another sexual act and if she did it, to 'explain [her] answer and perform the dare as though [he was] watching [her].'" (L.F. 22). The court concluded that Defendant was an audience of one

when he read the responsive emails indicating Victim had performed the dares. (L.F. 23). Comparing this case to *State v. Butler*, 88 S.W.3d 126 (Mo. App. S.D. 2002), the court determined that Defendant "[attempted to exploit Victim] in a way little different from any exploitation suffered in a visual presentation." (L.F. 23).

B. Standard of review.

"Constitutional challenges to the validity of any alleged right or defense asserted by a party to an action must be raised at the earliest opportunity consistent with good pleading and orderly procedure." *State v. Faruqi*, 344 S.W.3d 193, 199 (Mo. banc 2011) (internal citation and quotation marks omitted). "Rule 24.04 prescribes the proper time to raise such fundamental questions as the constitutionality of statutes upon which prosecutions are based." *State v. Turner*, 48 S.W.3d 693, 696 (Mo. App. W.D. 2001) (internal citation omitted). Rule 24.04 states:

> Defenses and objections based on defects in the institution of the prosecution or in the indictment or information . . . may be raised *only* by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided

constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver.

Rule 24.04. Here, Defendant raised his challenge to the constitutionality of the statute for the first time in his motion for judgment of acquittal at the close of the State's evidence. (Tr. 96-103). As such, Defendant did not preserve this claim for review, and it is within the Court's discretion to decline to review this claim.

In determining whether a statute is constitutional, this Court conducts review *de novo*. *State v. Vaughn*, 366 S.W.3d 513, 517 (Mo. banc 2012) (citing *City of Arnold v. Tourkakis,* 249 S.W.3d 202, 204 (Mo. banc 2008)). "Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision." *Id.* (citing *State v. Pribble,* 285 S.W.3d 310, 313 (Mo. banc 2009)). Defendant, "as the party challenging the statute's validity, bears the burden of proving the statute clearly and undoubtedly violates the constitution." *State v. Young*, 362 S.W.3d 386, 390 (Mo. banc 2012) (citing *State v. Richard*, 298 S.W.3d 529, 531 (Mo. banc 2009)).

C. Section 568.080 is not unconstitutional as applied to Defendant because Defendant's speech was not protected as it was an

integral part of his attempt to induce Victim to engage in a sexual performance.

Defendant argues that section 568.080 violates the First Amendment to the United States Constitution and Article I, section 8, of the Missouri Constitution because it impermissibly regulated his speech related to his sexual fantasies. (App. Br. 14). "The First Amendment and the Missouri Constitution both protect the freedom of speech, but it has long been recognized that these protections are not absolute." *Pribble*, 285 S.W.3d at 316 (internal citation omitted). "The United States Supreme Court has stated that '[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection.'" *Id.* (quoting *United States v. Williams*, 553 U.S. 285, 297-98 (2008)). "This Court has made similar assertions, previously upholding the validity of a prostitution-related statute that made it illegal to engage not only in the physical sexual acts but also in the negotiations." *Id.* (citing *State v. Roberts*, 779 S.W.2d 576, 579 (Mo. banc 1989)). "This Court reasoned that, '[b]ecause the words uttered as an integral part of the prostitution transaction do not have a lawful objective, they are not entitled to constitutional protection.'" *Id.* (quoting *Roberts*, 779 S.W.2d at 579); *see New York v. Ferber*, 458 U.S. 747, 761-62 (1982) ("It rarely has been suggested that the constitutional freedom for speech and press extends its

immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.") (internal citation and quotation marks omitted).

Section 568.080 is not unconstitutional as applied to Defendant because Defendant's speech was an integral part of his attempt to use Victim in a sexual performance, and was therefore not protected by the United States or Missouri Constitutions. Section 568.080 states:

> 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 . . . .

§ 568.080, RSMo. 2000. Section 566.010 includes the definitions for Chapters 566 and 568, but it does not define "sexual performance." § 566.010, RSMo. 2000. Section 556.061 defines "sexual performance" as "any performance, or part thereof, which includes sexual conduct by a child who is less than seventeen years of age[.]" § 556.061, RSMo. 2000.

1. Defendant attempted to induce Victim to engage in sexual conduct.

As used in Chapter 556, "sexual conduct" "means acts of human masturbation; deviate sexual intercourse; sexual intercourse; or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast of a female in an act of apparent sexual stimulation or

gratification[.]" § 556.061(29), RSMo. 2000. Defendant utilizes the definition of "sexual conduct" from section 566.010 rather than the definition in 556.061, and argues that "sexual performance" requires at least two people to engage in sexual conduct. (App. Br. 15). But because "sexual performance" is defined in Chapter 556, the definition of "sexual conduct," as used in the "sexual performance" definition, must also come from Chapter 556. *See George*, 717 S.W.2d at 858 (utilizing Chapter 556's definition of "sexual conduct" as used in the definition of "sexual performance"). Only when "sexual conduct" is used in Chapters 566 or 568, does section 566.010 apply. *See* § 566.010, RSMo. 2000 ("As used in this chapter and chapter 568, the following terms mean: . . . .").[1]

Here, Defendant's e-mails attempted to induce Victim to engage in sexual conduct. Defendant requested Victim on numerous occasions to masturbate. (Ex. 2B, emails dated 7/8/10 from 8:20 p.m. to 10:07 p.m.). As masturbation is included in the definition of "sexual conduct," Defendant's attempt to induce Victim to masturbate constituted an attempt to induce Victim to engage in "sexual conduct" as defined in Chapter 556.

[1] Although Defendant was charged with an offense from Chapter 568, section 568.080 does not use the term sexual conduct. § 568.080, RSMo. 2000.

2. The e-mail exchange constituted a performance.

Defendant argues that his conduct did not constitute a performance, so his protected fantasy speech was unconstitutionally criminalized. (App. Br. 16-17). Defendant makes a similar argument in his second point, arguing that, as a matter of law, Defendant's conduct did not constitute a performance as contemplated in section 568.080. (App. Br. 18-19).

"Performance" is not defined by statute; thus, its common definition should be used. *See State v. George*, 717 S.W.2d 857, 859 (Mo. App. S.D. 1986). In *George*, using the dictionary, the Southern District defined "performance" as "[a] presentation, especially a theatrical one, before an audience." *Id.* (internal citation and quotation marks omitted). The Court stated that section 568.080 is designed to "prohibit the exploitation of minors under seventeen in pornographic presentations for any reason." *Id.* Similarly, in *State v. Butler*, 88 S.W.3d 126, 129 (Mo. App. S.D. 2002), the Southern District determined that a performance is not limited to a "visual" performance. *Id.* at 129.

This case is analogous to *Butler*. In *Butler*, the defendant called a child on the telephone while the child's parents were not home. *Id.* at 127. During this call, the defendant described how sexual intercourse occurred, explained a method of contraception, and told the child to put lotion on her finger and

put her "finger up her bottom." *Id.* The child pulled her pants down and did as the defendant directed. *Id.* The defendant also told the child to touch her "front part" and that he wanted to have sex with her. *Id.* On appeal, the defendant argued there was insufficient evidence to sustain his conviction for use of a child in a sexual performance because "there was no evidence showing the acts were performed visually before an audience." *Id.* at 128. The Court held that, because the statute was not limited to visual performances, the evidence was sufficient to convict the defendant of use of a child in a sexual performance. *Id.* at 129-30. The Court concluded, "under the circumstances here, [the d]efendant exploited [the child] in a way little different from any exploitation suffered in a visual sexual presentation." *Id.* at 130.

Defendant argues that here there was no "audience." (App. Br. 16). But Defendant was the audience for whom Victim apparently performed. As in *Butler*, Defendant attempted to exploit Victim in a manner little different from any exploitation suffered in a visual sexual presentation. Defendant requested Victim to engage in acts of sexual conduct and to notify him when she had done so. (Tr. 42-49, Ex. 2B). From Defendant's perspective, Victim would then engage in the sexual conduct Defendant suggested (for his own sexual gratification), as evidenced by her responsive e-mails stating that she

had carried out Defendant's instructions. (Tr. 43-47, Ex. 2B). This exchange—Defendant's inducement, Victim's apparent acts of sexual conduct, and the responsive confirming e-mails—constituted a performance.

Defendant also argues that the trial court's focus on the fact that Defendant became an "audience" when he read Victim's responsive e-mails was "misplaced" because Defendant "was charged with sending the emails, not receiving them." (App. Br. 21). But Defendant was not charged with the crime of sending e-mails; rather, Defendant was charged with the crime of attempted use of a child in a sexual performance. (L.F. 10). The exchange of e-mails, including Defendant's instructions to Victim, Victim's apparent completion of the instructions, and the e-mails responding to Defendant and informing him the acts of sexual conduct had been completed, taken together, constituted the sexual performance.

This e-mail exchange is the same type of performance as the phone conversation in *Butler*. As in *Butler*, Defendant attempted to use Victim in a sexual performance by telling her what conduct to engage in and instructing her to inform him when she had done so. Although neither the defendant here nor the defendant in *Butler* witnessed the victims' acts of sexual conduct, their inducement, followed by the victims' (or in this case, Sgt.

Kavanaugh's) confirmations that they had executed the defendants' instructions, constituted a performance as contemplated in section 568.080.

Defendant attempts to distinguish this case from *Butler* by emphasizing that "the emails were sent and received after a significant delay, in the same fashion as correspondence sent through traditional mail . . . ." (App. Br. 16). But the record demonstrated that several of the e-mails were exchanged within minutes of each other. For example, on July 8 at 9:51 p.m., Defendant instructed Victim to take a finger and "rub it back and fourth [sic] on [her] clit." (Ex. 2B). From Defendant's perspective, at 9:52 p.m., Victim responded, saying "Done," and asking Defendant if the game excited him. (Ex. 2B). At 9:55 p.m., Defendant confirmed that the game excited him, and asked if it excited Victim. (Ex. 2B). At 10:04 p.m., Defendant told Victim he had to go to bed to "finish mast[u]rbating thinking about [Victim] touching [herself]," and instructed Victim to masturbate while thinking of him. (Ex. 2B). At 10:07 p.m., Victim responded, saying, "Done." (Ex. 2B). This quick exchange of e-mails demonstrates that the e-mail exchange occurred frequently, so any distinction between the medium of e-mails and other forms of communications is a false distinction.

Additionally, modern methods of communication have changed the traditional concept of "performance." Performances can be in front of live

audiences, through solely auditory communication (e.g., phone sex performances), or through text-based descriptions. The simple fact that Defendant attempted to induce Victim to engage in a sexual performance through e-mail messages rather than a phone conversation does not distinguish this case from *Butler*. For example, when a hearing-impaired person chooses to make a phone call, he uses a service wherein he types a message to a relay operator, the relay operator verbally communicates this message to the recipient of the phone call, the recipient responds verbally to the operator, and the operator transcribes the message and relays it to the hearing-impaired person. If a person with a hearing-impairment were to engage in the same conduct as the defendant in *Butler*, but the communications were delayed by the time it took the relay operator to communicate the messages, the exchange would be no less a sexual performance than that found in *Butler*. Likewise, a hearing-impaired person engaging a phone sex company utilizing the relay service would be experiencing no less of a "performance" than Defendant experienced through his e-mail communications with Victim.

Defendant's responses to Victim's apparent confirmations that she had engaged in the sexual conduct further show that Defendant attempted to use Victim in a sexual performance. Defendant argues that his e-mails "do not

contemplate any crime as it is not illegal to request that someone over the age of fifteen engage in private, sexual activity." (App. Br. 17). But Defendant's requests that Victim tell him when she had completed the dares, and to complete the dares as if he were watching her, show that his e-mails were not innocuous. In fact, his sexual gratification in response to the e-mails further proves that his purpose in sending the e-mails was to learn that Victim had engaged in the sexual conduct he suggested—specifically, that Defendant intended to use Victim, through the e-mail correspondence, in a sexual performance.

Defendant's e-mail exchange with Sgt. Kavanaugh posing as Victim constituted a sexual performance, and the trial court did not err in finding Defendant guilty of attempt to use a child in a sexual performance. Because Defendant's speech was an integral part of his attempt to use Victim in a sexual performance, section 568.080 was not unconstitutional as applied to him. Defendant's Points I and II should be denied.

II. (sufficiency-substantial step)

The trial court did not err in overruling Defendant's motion for judgment of acquittal at the close of all evidence because the State presented sufficient evidence that Defendant took a substantial step toward the commission of the crime of use of a child in a sexual performance in that Defendant requested Victim engage in sexual conduct (responds to Defendant's Point III).

A. Standard of review.

"In reviewing the sufficiency of the evidence in a court-tried criminal case, the appellate court's role is limited to a determination of whether the [S]tate presented sufficient evidence from which a trier of fact could have reasonably found the defendant guilty." *State v. Vandevere*, 175 S.W.3d 107, 108 (Mo. banc 2005) (citing *State v. Niederstadt*, 66 S.W.3d 12, 13-14 (Mo. banc 2002)). "'The Court examines the evidence and inferences in the light most favorable to the verdict, ignoring all contrary evidence and inferences.'" *Id.* (quoting *Niederstadt*, 66 S.W.3d at 13-14)).

B. The record pertaining to this claim.

On June 23, 2010, Defendant sent Victim an e-mail, asking Victim if "JK1whitetiger@aol.com" was her personal e-mail address and assuring her that "Dblankenship1@msn.com" was his e-mail address to which he alone

had access. (Tr. 25-26, Ex. 2A). Victim e-mailed Defendant back, confirming that it was her e-mail address. (Tr. 26, Ex. 2A). The next day, Defendant emailed Victim again and asked, "Do you mind if I flirt with you on the computer? Let me know[.]" (Tr. 26, Ex. 2A). Victim responded, "Yeah, No, kind of, L[augh] O[ut] L[oud]." (Tr. 27, Ex. 2A). On June 25, Defendant sent the following response:

> 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 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, Ex. 2a). This e-mail disturbed Victim, and Victim thought it was inappropriate, so she showed the email to her mother ("Mother"). (Tr. 28).

Mother contacted the police about Defendant's e-mails, and she was put in touch with Sergeant Adam Kavanaugh of the St. Louis County Police Department. (Tr. 87, 33-34). Sgt. Kavanaugh was the supervisor of the Special Investigations Unit. (Tr. 33-34). With Victim's permission, Sgt. Kavanaugh assumed Victim's e-mail address and began corresponding with Defendant as though Sgt. Kavanaugh were Victim. (Tr. 35. 29).

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> [Y]ou made something grow between my legs. I took off my pants to see what happened. My penis is hard and I started to rub it then stroke it up and down. I am going to cum soon. W[]ould you like to watch me mast[u]rbate? If you say yes I'm going t[o]go all over myself.

(Ex. 2B, e-mail dated 7/7/10 at 10:12 p.m.). Sgt. Kavanaugh asked how Victim could see Defendant masturbate, and Defendant responded, "It may have to actually wait until my next trip to Missouri. I'll talk detail after your answer." (Ex. 2B, e-mail dated 7/7/10 at 10:18 p.m.).

The next day, Defendant began e-mailing Victim at 9:43 a.m. (Ex. 2B). Defendant began by instructing Victim to put her hand inside her shirt and touch her bare breast, and to respond that she followed his instructions. (Ex. 2B, e-mail dated 7/8/10 at 9:43 a.m.). At 12:15 p.m., Sgt. Kavanaugh responded that she had completed the dare. (Ex. 2B). In the next series of e-

mails, Defendant instructed Victim to put her hand on the inside of her thigh, place her hand between her legs outside her clothing, take her pants off and "rub [her]self on top of [her] panties," and to "slip [her] hand inside [her] panties and rub [herself]." (Ex. 2B, e-mails dated 7/8/10 at 8:20 p.m., 8:40 p.m., 8:57 p.m., and 9:06 p.m.). After each of these e-mails, Sgt. Kavanaugh responded "done." (Ex. 2B, e-mails dated 7/8/10 at 8:28 p.m., 8:40 p.m., 8:59 p.m., and 9:12 p.m.). Defendant then twice told Victim to place her finger inside her "pussy." (Ex. 2B, e-mails dated 7/8/10 at 9:21 p.m. and 9:37 p.m.). After Sgt. Kavanaugh responded "done," Defendant indicated that he was going to go to bed to "finish mast[u]rbating thinking about [Victim] touching [herself]," and instructed Victim to masturbate while thinking of him and to tell him about it the next day. (Ex. 2B, e-mail dated 7/8/10 at 10:04 p.m.). Sgt. Kavanaugh responded three minutes later, saying, "done." (Ex. 2B, e-mail dated 7/8/10 at 10:07 p.m.).

In another e-mail, Defendant stated, "That makes me want to mast[u]rbate. Did you know that I mast[u]rbate thinking about you and the things I want to do to and with you?" (Ex. 2B, e-mail dated 7/31/10 at 9:30 p.m.). Defendant also sent Victim two e-mails containing sexually explicit stories. (Ex. 2B, e-mails dated 7/13/10 at 9:03 p.m. and 7/14/10 at 8:55 p.m.). On July 18, Defendant dared Victim to lick her nipples, and asked Victim if

she would rub his penis until he ejaculated. (Ex. 2B, e-mail dated 7/18/10 at 4:29 p.m.). Defendant also asked Victim if she would like to practice giving oral sex on him, and if she would let Defendant see her naked and watch her masturbate. (Ex. 2B, e-mails dated 7/22/10 at 7:30 a.m. and 7:59 p.m.). On July 26, Defendant instructed Victim to "touch [her]self[,] give [her]self pleasure[,] and as [her] pussy g[o]t wet[,] put [her] fingers in side [sic] then pull them out and place them in [her] mouth." (Ex. 2B, e-mail dated 7/26/10 at 7:46 p.m.). Sgt. Kavanaugh responded by saying "done." (Ex. 2B, e-mail dated 7/26/10 at 10:29 p.m.).

On September 7, 2010, Defendant told Victim to touch her nipples with her fingers and squeeze them. (Ex. 2B, e-mail dated 9/7/10 at 6:17 p.m.). Sgt. Kavanaugh responded, telling Defendant Victim would do that for him. (Ex. 2B, e-mail dated 9/8/10 at 4:58 p.m.). Defendant asked Victim if she wanted to masturbate him, and told Victim that he might show her his penis sometime. (Ex. 2B, e-mails dated 9/16/10 at 7:19 p.m. and 9/23/10 at 4:38 p.m.). In his final e-mail, Defendant told Victim he would show her his penis the next time he sees her, and he told her he wanted to see her naked body. (Ex. 2B, e-mail dated 9/26/10 at 7:48 a.m.).

In total, Defendant sent Victim 67 e-mails between June 22, 2010 and September 26, 2010. (Exs. 2A, 2B). On December 1, 2010, Mother called

Defendant and confronted him about the e-mails. (Tr. 88-90, Ex. 4). Sgt. Kavanaugh gave Mother recording equipment, and she recorded the phone call. (Tr. 89, Ex. 4). Defendant admitted to sending the e-mails and explained that he just wanted to "shock" Victim because he "thought [Victim] ha[d] always been a little more sexual for her age than she should be." (Tr. 92). Defendant stated that sending and receiving the e-mails "was a sexual release for [Defendant]," and "it was sexually exciting that someone – someone was giving [him] a positive." (Ex. 4, p. 3). Defendant further stated that if Victim had given a "negative" response, then he would have "kicked in and . . . probably wouldn't have stopped." (Ex. 4, p. 3). Defendant admitted that in the e-mails he asked if the next time he came to Missouri, Victim would have sex with him, but he claimed it was "all fantasy." (Ex. 4, p. 4). Defendant told Mother he stopped sending the e-mails because he felt guilty after becoming "addicted" to sending the e-mails and receiving the "positive" responses. (Ex. 4, p. 8, 4).

C. Defendant's e-mail exchange with Victim was an attempt to induce Victim to engage in a sexual performance.

A person commits the crime 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. A 'substantial step' is

conduct which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense." § 564.011, RSMo. 2000. The inchoate offense of attempt has two elements: "(1) the defendant has the purpose to commit the underlying offense and (2) the doing of an act that is a substantial step toward the commission of that offense." *State v. Wurtzberger*, 40 S.W.3d 893, 896 (Mo. banc 2001).

Defendant argues that the State presented insufficient evidence to prove that he requested Victim to undertake any action that would constitute a sexual performance. (App. Br. 22-24). As discussed in Point I above, the e-mail exchange between Defendant and Sgt. Kavanaugh posing as Victim constituted a sexual performance. Defendant requested Victim to engage in acts of sexual conduct and to notify him when she had done so. (Tr. 42-49, Ex. 2B). From Defendant's perspective, Victim would then engage in the sexual conduct Defendant suggested (for his own sexual gratification), as evidenced by the responsive e-mails stating that Victim had carried out Defendant's instructions. (Tr. 43-47, Ex. 2B). This exchange—Defendant's inducement, Victim's apparent acts of sexual conduct, and the responsive confirming e-mails—constituted a performance. Because Defendant's requests and the apparent responsive actions and e-mails signifying Victim completed those actions constituted a sexual performance, from Defendant's perspective, he

not only attempted to use a child in a sexual performance—he engaged in conduct that would have completed the crime had circumstances been as he believed them to be.[2] The only thing that was missing from Defendant's attempt was the fact that Victim had been replaced by Sgt. Kavanaugh.

Defendant, citing *State v. Bates*, 70 S.W.3d 532 (Mo. App. W.D. 2002), next argues that his conduct did not constitute a substantial step toward the commission of the crime. (App. Br. 25). But *Bates* is readily distinguishable from the present case. In *Bates*, the defendant was charged with attempted statutory sodomy and attempted statutory rape for sending the victim sexually explicit letters and pictures in the mail. *Id.* at 533-34. The Western District overturned the defendant's convictions, finding that his letters were merely an expression of his desire to engage in the prohibited conduct, and thus did not amount to a substantial step to complete the crimes of statutory rape and sodomy. *Id.* at 537.

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[2] "It is no defense to a prosecution under this section that the offense attempted was, under the actual attendant circumstances, factually or legally impossible of commission, if such offense could have been committed had the attendant circumstances been as the actor believed them to be." § 564.011, RSMo. 2010.

Here, conversely, Defendant's e-mails constituted a substantial step in inducing Victim to engage in a sexual performance. As opposed to the defendant in *Bates*, Defendant completed the acts that would have constituted the offense of use of a child in a sexual performance but for the fact that Victim had been replaced by Sgt. Kavanaugh. As Defendant was Victim's uncle, Defendant personally knew Victim and was aware that she was sixteen years old. (Tr. 16-17, 82-83). Defendant obtained Victim's personal e-mail address, sent her an e-mail confirming it was hers alone, confirmed for her that his e-mail address was his alone, sent an e-mail asking if he could flirt with Victim, and sent an e-mail suggesting his truth-and-dare "game." (Tr. 25-28, Ex. 2A). After Victim reported these e-mails to authorities, Defendant then exchanged a series of e-mails with Sgt. Kavanaugh posing as Victim that would have constituted the completed act of use of a child in a sexual performance had Sgt. Kavanaugh not replaced Victim. (Ex. 2B). Because Defendant's conduct would have constituted the completed offense (if Sgt. Kavanaugh had not replaced Victim), Defendant's conduct was a substantial step showing the firmness of his purpose to complete the commission of the crime of use of a child in a sexual performance, and *Bates* is readily distinguishable.

Defendant argues that his actions "fail to establish a substantial step toward the commission of use of a child in a sexual performance" because he did not ask Victim to produce or send any sexually explicit media, and his actions "did not reflect or indicate in any way that he was intending to view or listen to [Victim] engage in a sexual act with another person." (App. Br. 25). But, as discussed above in Point I, no visual presentation was necessary for the conduct to constitute a performance. *See Butler*, 88 S.W.3d at 129. Furthermore, because Defendant exploited Victim in the same manner as the defendant in *Butler*, it was immaterial that Defendant's exploitation occurred through the medium of e-mail exchanges rather than a phone conversation. *Id.* at 130.

Additionally, Defendant's argument that the sexual conduct had to be with another person is incorrect. As discussed in Point I, Defendant's reliance on section 566.010 for the definition of the term "sexual conduct" is misplaced. The term "sexual conduct" utilized in the definition of "sexual performance" means "acts of human masturbation; deviate sexual intercourse; sexual intercourse; or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast of a female in an act of apparent sexual stimulation or gratification[.]" § 556.061(29), RSMo. 2000. This definition does not require the presence of an actor other than the

victim. As such, Defendant's argument that Defendant did not request that Victim engage in a sexual performance because he did not request her to engage in a sexual act with another person is unavailing.

The State presented sufficient evidence to prove Defendant took a substantial step to use Victim in a sexual performance when he sent Victim e-mails requesting her to engage in a sexual performance and alert him when the sexual conduct was completed. Defendant's third point should be denied.

CONCLUSION

The trial court did not commit reversible error in this case. Defendant's conviction and sentence should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Jennifer A. Rodewald
JENNIFER A. RODEWALD
Assistant Attorney General
Missouri Bar No. 64236

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-1626
Fax: (573) 751-5391
Jennifer.Rodewald@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 6,753 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 29th day of August, 2013, to:

Kim Freter
225 South Meramec
Suite 301
St. Louis, Missouri 63105

/s/ Jennifer A. Rodewald
JENNIFER A. RODEWALD