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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001424-MR

RANDY STONE — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, V, JUDGE
ACTION NO. 07-CR-00358

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO, THOMPSON, AND WINE, JUDGES.

WINE, JUDGE: Randy Stone ("Stone") appeals his conviction and sentence in the Campbell Circuit Court for attempted unlawful transaction with a minor. On appeal, he raises several allegations of error: (1) that he was entitled to a directed verdict because the Commonwealth failed to prove an essential element of the charged offense; (2) that the trial court erred by failing to grant his motion for a

mistrial after a sexually explicit photograph was shown to the jury during opening statements; (3) that the trial court erred by granting the Commonwealth's *motion in limine* to preclude him from raising "impossibility" as a defense; (4) that the trial court erred by failing to instruct the jury on lesser-included offenses; (5) that the trial court erred by refusing to instruct the jury on entrapment as a defense; (6) that the trial court erred by failing to grant his motion for a mistrial based on allegedly improper comments about Jury Instruction Number Four; and (7) that the trial court erred by sustaining the Commonwealth's objection during his closing argument to his characterization of Kentucky Revised Statute ("KRS") 503.064. Upon review of the record and following oral arguments, we affirm.

Background

In April of 2007, Stone was forty-three years of age. During that month, Stone began "chatting" with whom he believed to be a thirteen-year-old girl, "Tanya," over the internet. However, Tanya was never a real person. Instead, two members of a child-protection organization called "Perverted Justice" (an organization that collaborates with law enforcement to catch internet child-predators), played the role of Tanya. The two individuals who posed as Tanya were Thomas Donovan ("Donovan") and Eric Walker ("Walker"), volunteers for the organization.

The first "chat" occurred on April 9, 2007. Within the first few minutes of chatting, Donovan (pretending to be Tanya) told Stone that he was a thirteen-year-old female. Thereafter, Stone initiated a discussion about sex and

asked Tanya whether she had ever had sex before. Stone further talked about setting up a meeting with Tanya. He indicated that he lived about five hours away from her. He sent pictures of his penis to Tanya during this first meeting using a webcam. Before sending the pictures, Stone asked Tanya whether the door to her room was closed. At the end of the first chat, Stone asked Tanya to erase any evidence of their discussion and told her not to tell anyone about it.

These "chats" between Stone and Tanya continued over the next fifty-eight day period. On three occasions (April 8, May 9, and May 22, 2007), Stone sent videos of himself masturbating to Tanya. The chats were transcribed and read to the jury. Stone frequently told Tanya to take steps to hide their conversations, such as deleting their chats or shutting her bedroom door. Stone told Tanya that he wanted to engage in sexual intercourse, touch her vagina, and asked her if she would perform oral sex on him. Further, he expressed to Tanya that he could get into a lot of trouble with a thirteen-year-old girl.

On June 12, 2007, Stone and Tanya discussed setting up a meeting. They originally planned to meet on June 21, 2007; however, Stone was not able to get off work that day, and a new meeting was set up for July 5, 2007. The meeting was to be held at what Stone believed to be Tanya's house[1] in Highland Heights. Stone made the five hour drive from Almo, Kentucky to meet Tanya; however, police were not there that day due to a miscommunication. The meeting was rescheduled until the next day. Stone drove home to Almo and then returned the

[1] The house was actually a sting house owned by the Highland Heights Police Department.

next day to meet Tanya. After driving a total of fifteen hours in a two-day period, Stone waited in a Lowe's parking lot (the meeting place) for Tanya to arrive.

For obvious reasons, Tanya never arrived. However, after observing Stone waiting in the parking lot for 20 to 30 minutes, Chief Mullins ("Mullins") of the Highland Heights police department approached Stone's vehicle. Mullins showed Stone a photograph, which was a picture of Stone that he had sent to Tanya online. Mullins asked Stone whether it was him in the photograph. Stone confirmed that it was. Mullins then said to Stone that he guessed Stone knew why he was there. Stone said, "Yeah, I do."

In his police interview, Stone later denied knowing that Tanya was thirteen-years-old. Instead, he averred that he believed Tanya was eighteen years of age. A search of Stone's house revealed webcams and handwritten directions to the sting house (the house where he believed Tanya lived).

On July 15, 2008, Stone was convicted by a Campbell County jury of first-degree attempted unlawful transaction with a minor. He was sentenced to nine-years' imprisonment.

Analysis

I. Directed Verdict

Stone's first argument on appeal is that he was entitled to a directed verdict because the Commonwealth failed to prove an essential element of first-degree attempted unlawful transaction with a minor. Specifically, Stone argues that the KRS 530.064 requires that an *actual* minor be involved. As "Tanya" was

actually an adult male, Stone argues that he could not be found guilty of the crime of attempt. Stone's second argument for directed verdict is that KRS 530.064 requires that the defendant "induces, assists, or causes a minor to engage in . . . illegal sexual activity." For this second argument, Stone argues that even if all of the alleged facts were true, the minor's activity would not have been illegal (rather, that only his own actions would have been illegal).

As is well established, upon a trial court's consideration of a motion for directed verdict:

> [T]he trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). Upon appellate review, the test for a directed verdict is whether, "under the evidence as a whole it would not be clearly unreasonable for a jury to find guilt." *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983). Only then is a defendant entitled to a directed verdict. *Id*.

Unlawful transaction with a minor in the first degree is defined by KRS 530.064(1), which states:

> (1) A person is guilty of unlawful transaction with a minor in the first degree when he . . . knowingly induces, assists, or causes a minor to engage in:
> (a) Illegal sexual activity . . . .

In the present case, Stone was charged with criminal attempt to engage in an unlawful transaction with a minor. KRS 506.010, the criminal attempt statute, provides in pertinent part:

> (1) A person is guilty of criminal attempt to commit a crime when, acting with the kind of culpability otherwise required for the commission of the crime, he:
> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
> (b) Intentionally does or omits to do anything which, under the circumstances *as he believes them to be*, is a substantial step in a course of conduct planned to culminate in his commission of the crime.

(Emphasis added.) In addition to the above requirements, KRS 506.010 requires that the existence of a substantial step be found beyond a reasonable doubt. *Id*. However, as our Supreme Court has previously stated, whether a substantial step has been taken is a question for the jury. *Young v. Commonwealth*, 968 S.W.2d 670, 673 (Ky. 1998), *overruled on other grounds by Matthews v. Commonwealth*, 163 S.W.3d 11, 26-27 (Ky. 2005).

We first address Stone's argument that the statute requires the involvement of an "actual" minor. This argument may be quickly dispensed with as Stone was charged with criminal attempt, rather than with unlawful transaction with a minor. Although KRS 530.064 requires that an *actual* minor be involved, the criminal attempt statute (KRS 506.010) has no such requirement. Rather, KRS

506.010 creates culpability where the defendant's actions constitute a substantial step toward the commission of what would be a crime "under the circumstances as he believes them to be." Here, there was significant evidence that Stone *believed* he was dealing with a thirteen-year-old child, which is sufficient for the purposes of KRS 506.010.[2]

We now address Stone's next argument, that KRS 530.064 requires that the sexual activity of the minor be illegal. Stone interprets the language in KRS 530.064, requiring that the person "knowingly induces, assists or causes a minor to engage in illegal sexual activity," to mean that the *minor's* sexual activity must be illegal. Here, Stone argues that Tanya's behavior would not have been illegal, but rather that it would have been *his own behavior* that would have been illegal (if a sexual encounter had actually taken place between the two). However, this argument misinterprets the statute. In the case of sexual activity with minors, it is the sexual activity *itself* which is illegal. *See, e.g., Young,* 968 S.W.2d at 672. As any sexual activity between a forty-three year old man and a thirteen-year-old girl would have been illegal, the requirements of the statute have been met.

Further, Stone's allegation that the Commonwealth failed to prove he took a "substantial step" was not raised before the trial court. Rather, defense counsel argued:

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[2] The Commentary to KRS 506.010 makes clear that this is precisely the sort of situation that the statute contemplates. This is evidenced by the following example from the Commentary: "D believes that X is a juror and offers him a bribe. In fact X is not a juror. Because of subsection (1)(a), the impossibility of D completing the offense of bribing a juror is no defense to a charge of criminal attempt to commit that bribery."

> "I'm not arguing the facts, I'm arguing the law. The facts, I have to stipulate, are in the light they best presented it. And, let's assume for the sake of this argument -13 year old - what he thought to be a 13 year old - let's assume for the sake of this argument he made a substantial step. What did he make a substantial step to do? Potentially to commit sodomy. Potentially to commit sex abuse. Potentially to commit rape. All second degrees under the statute because none of it would ostensibly be forcible. Did he take a substantial step to encourage a minor to engage in illegal sexual activity? No. . . . Where's the illegal activity?"

Thus, it is clear that the thrust of defense counsel's argument for directed verdict turned on an erroneous interpretation of the statute that assumes the *minor* must be induced to engage in an illegal activity other than the illegal sexual activity itself. As such, the issue of whether a substantial step was taken is not properly preserved for review, and we decline to address it. Nevertheless, we briefly note that driving over fifteen hours in a two-day period to meet a thirteen-year-old at a pre-designated meeting spot provides evidence of a substantial step. Further, the explicit internet discussions between the two most certainly provide evidence of Stone's intent for what was to occur at that meeting.

Accordingly, we affirm on this ground.

II. Motion for Mistrial

Stone's next argument on appeal is that the trial court erred by failing to grant his motion for a mistrial after sexually explicit photographs of his penis were shown to the jury during opening arguments. Stone contends that the only

possible purpose of these pictures was to inflame the jury and that the prosecutor engaged in misconduct by showing them to the jury.

On review of the denial of a motion for a mistrial, the applicable standard is abuse of discretion. *Martin v. Commonwealth*, 170 S.W.3d 374, 381 (Ky. 2005). "A mistrial is appropriate only where the record reveals 'a manifest necessity for such an action or an urgent or real necessity.'" *Clay v. Commonwealth*, 867 S.W.2d 200, 204 (Ky. App. 1993). We find that the trial court did not abuse its discretion here.

During opening arguments, the prosecutor explained to the jury that Stone sent pictures of his face and his penis to the Perverted Justice decoy over the internet during some of their internet "chats." Stone objected when pictures of his penis were shown to the jury during opening statement, arguing that the pictures were not in evidence and may never get into evidence. The Commonwealth argued that the pictures were provided in discovery and that it was always clear the Commonwealth intended to use them at trial. The judge denied the motion for mistrial but stated that *the ruling was subject to the pictures being properly admitted* later at trial. The pictures were indeed admitted through the Perverted Justice volunteer, Thomas Donovan, at trial. Donovan testified that Stone sent pictures of his penis via a webcam on the very first day they chatted and that he sent video of himself masturbating on other occasions.

As the evidence complained of here was properly admitted at trial, we find no grounds for a mistrial. It has long been the practice in this Commonwealth

that a prosecutor may show "admissible items of real evidence to the jury during opening statement . . . ." *Fields v. Commonwealth*, 12 S.W.3d 275, 281 (Ky. 2000). While our courts have recognized that the use of unauthenticated aids and materials during opening statements may be grounds for a mistrial if not properly authenticated and admitted at trial, there is no ground for a mistrial where the evidence complained of is authenticated and admitted at trial. *Parker v. Commonwealth*, 241 S.W.3d 805, 808-809 (Ky. 2007). However, we note that best practice is to refrain from using unauthenticated aids and materials during opening statements in case the aids or materials are not later admitted at trial, as "a mistrial is invited when an admonition may not be able to cure the error." *Id*.

III. Defense of Impossibility

Stone's next alleged ground of error is that the trial court erred by granting the Commonwealth's *motion in limine* to preclude him from raising "impossibility" as a defense to the crime of attempt.

Impossibility as a defense to a crime of attempt has been often discussed in this jurisdiction and others, although not always by the same term. *See, e.g. McDowell v. Commonwealth*, 207 Ky. 680, 269 S.W. 1019 (1925). (Man suffering from impotence could still be found guilty of attempt to have unlawful carnal knowledge with a woman). Impossibility is often divided into two categories: legal impossibility and factual impossibility. *See, e.g., U.S. v. Peete*, 919 F.2d 1168, 1172 (6th Cir. 1990). In the present case, Stone is alleging *factual impossibility*, or more pointedly, that the fact that no minor child was involved

made it factually impossible for him to attempt the offense of first-degree unlawful transaction with a minor. However, most jurisdictions, including the Sixth Circuit, have long held that factual impossibility is no defense to the inchoate crimes (including attempt). *See, e.g., U.S. v. Peete, supra*; *U.S. v. Goodpaster*, 769 F.2d 374, 380 (6th Cir. 1985); *U.S. v. Dixon*, 449 F.3d 194, 202 (6th Cir. 2006); *U.S. v. Pietri*, 683 F.2d 877, 879 (5th Cir. 1982).

Moreover, we are of the opinion that our legislature intended to abolish the defense of impossibility as it applies to this crime of attempt when it enacted KRS 506.010. To begin, the statute includes language that finds culpability where a defendant engages in conduct which would constitute the crime "*if the attendant circumstances were as he believes them to be*" or takes a substantial step toward committing what would be a crime "*under the circumstances as he believes them to be*." KRS 506.010 (Emphasis added). Further, the Commentary to KRS 506.010 makes this purpose painstakingly clear. An example of factual impossibility is given in explanation of the legislature's stance on what it calls "impossibility of performance" (more commonly described as factual impossibility), stating:

> D believes that X is a juror. In fact X is not a juror. Because of subsection (1)(a), the impossibility of D completing the offense of bribing a juror is no defense to a charge of criminal attempt to commit that bribery.

Commentary to KRS 506.010.

In consideration of the foregoing, we are persuaded that the defense of impossibility is inapplicable to a crime of attempt and that the trial court properly granted the Commonwealth's *motion in limine* to exclude any argument or testimony to that effect.

IV. Instruction on Lesser Included Offenses

Stone also argues that the trial court erred by failing to instruct the jury on supposed lesser included offenses such as attempted rape, attempted sodomy, or attempted sexual abuse. We disagree. As our Supreme Court has previously stated, "if the same act may constitute either of two offenses, the grand jury may elect to indict on either and the other is not considered a lesser included offense." *Young*, 968 S.W.2d at 672. *See also, Davidson v. Commonwealth*, 436 S.W.2d 495 (1969); *Taylor v. Commonwealth*, 384 S.W.2d 333 (1964).

Moreover, "an instruction on a lesser-included offense is required only if, considering the totality of the evidence, the jury could have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense." *Baker v. Commonwealth*, 103 S.W.3d 90, 94 (Ky. 2003) (*internal citations omitted*). Here, there was no evidence which would support a finding of not guilty on the charge of attempted unlawful transaction with a minor and yet would support a conviction for a lesser offense of attempted rape, attempted sodomy, or attempted sexual abuse.[3]

[3] In *Combs v. Commonwealth*, 198 S.W.3d 574 (Ky. 2006), the Kentucky Supreme Court held that attempted sexual abuse could be a lesser included offense of unlawful transaction with a minor. However, in *Combs*, the victim specifically testified that she did not consent to the sexual activity. *Id*. at 578. As unlawful transaction with a minor requires inducement of the minor (presuming there is no

Accordingly, we affirm on this ground.

V. Defense of Entrapment

Stone's next allegation of error is that the trial court erred by refusing to instruct the jury on entrapment as a defense. We disagree.

The defense of entrapment recognizes that members of law enforcement "go too far when they 'implant in the mind of an innocent person the *disposition* to commit the alleged offense and induce its commission in order that they may prosecute.'" *Jacobson v. United States*, 503 U.S. 540, 553, 112 S.Ct. 1535, 1543, 118 L.Ed.2d 174 (1992), *quoting Sorrells v. U.S.,* 287 U.S. 435, 442, 53 S.Ct. 210, 212, 77 L.Ed. 413 (1932). A valid defense of entrapment involves two interrelated elements: (1) government inducement of criminal conduct, and (2) the absence of criminal predisposition on the part of the defendant. *Matthews v. United States*, 485 U.S. 58, 63, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988). *See also, Wyatt v. Commonwealth*, 219 S.W.3d 751, 756 (Ky. 2007).

In the present case, neither element for a valid defense of entrapment was present. To begin, the Perverted Justice decoys never mentioned sexual activity or setting up a meeting with Stone before *first* being approached by him. Indeed, Stone was the first to initiate sexual "chatting" (even after "Tanya" stated that she was only thirteen) as well as the first to initiate discussions about meeting

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forcible compulsion), it would have allowed for a finding of not guilty, and yet still allowed a finding of guilty on attempted sexual abuse. There is no such testimony in the present case. Indeed, Stone argued in his motion for directed verdict that any sexual activity would have been "consensual" (and no evidence was presented by either side to the contrary). Thus, there is no possibility that a jury could have convicted Stone on attempted sexual abuse (or attempted rape or sodomy) and, at the same time, found him not guilty of attempted unlawful transaction with a minor.

in person. Concerning the second element of a valid entrapment defense, there was evidence that Stone had a criminal predisposition toward this type of behavior. The Commonwealth presented evidence that Stone had chatted with other twelve and thirteen-year-old girls in online chats. As Stone approached Tanya first and initiated the sexual discussions and discussions of setting up an in-person meeting, the persona of Tanya cannot have been said to induce Stone.

Accordingly, we find that the trial court properly refused to instruct on the defense of entrapment.

VI. Improper Comments about Jury Instruction Number Four

Stone also contends that the trial court erred by failing to grant his motion for a mistrial based upon allegedly improper comments made when the trial court read Jury Instruction Number Four to the jury. However, Stone makes no citation to the record in the section of his brief which raises this claim of error, nor does he cite any legal authority whatsoever for the claim. Therefore, we exercise our discretion under CR 76.12(8)(a) to strike this portion of Stone's brief. Thus, we do not address this issue on appeal. *See* CR 76.12(4)(v) and CR 76(8)(a).

Even if we address the oral instruction, the court said nothing different than what the movant argued –that there was no real victim, only a fictional character. We recognize that Rule of Criminal Procedure ("RCr") 9.54(1) mandates the trial court to instruct the jury in writing. Here, the trial court expanded on the description of the "victim." In *Muncy v. Commonwealth*, 132 S.W.3d 845, 848 (Ky. 2004), an oral definition given by the trial court was held to

not unduly impact an appellant's rights. We agree that it was error for the trial court to expand upon the term "victim." However, "if upon consideration of the whole case it does not appear that there is a substantial possibility that the result would have been any different, the error will be held non-prejudicial." *Gosser v. Commonwealth*, 31 S.W.3d 897, 903 (Ky. 2000), *quoting Abernathy v. Commonwealth*, 439 S.W.2d 949, 952 (Ky. 1969).

VII. Commonwealth's Objection during Stone's Closing Argument

Stone's final argument on appeal is that the trial court erred by sustaining the Commonwealth's objection during his closing argument concerning the language of KRS 503.064. Although Stone again fails to cite any authority in this section of the brief, there are citations to the record, and we will undertake review of the issue.

Stone contends that defense counsel was merely citing the exact language of KRS 503.064 during closing arguments, at which point the Commonwealth objected. However, a review of the record shows that defense counsel actually asked the jury how Stone could be causing, inducing, or assisting the victim to engage in illegal sexual activity where the victim was not doing anything illegal. Defense counsel stated, specifically: "The victim is not doing anything illegal; the victim is simply engaging in consensual sex." Understandably, the Commonwealth objected at this point, arguing that the statement was improper as the victim would certainly be engaging in illegal sexual activity as the victim would not be of the legal age to consent. The trial court

agreed, stating that the sexual activity itself would have been illegal, even though the minor herself could not have been prosecuted for it. We agree with the trial court.

Defense counsel was, again, arguing under an erroneous interpretation of the statute whereby he believed that the minor had to be engaging in conduct which would make him or herself criminally liable. *See, e.g., Young, supra*. Accordingly, we affirm on this ground.

Conclusion

The judgment and sentence of the Campbell Circuit Court is hereby affirmed.

STUMBO, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, CONCURRING: I concur with the result reached by the majority. I write to express my view that the legislature should clarify the potential penalties applicable when the perpetrator utilizes the internet to solicit sexual conduct.

Specifically, I point out the anomaly presented by the more specific conduct described in KRS 510.155 and our criminal attempt statute. That statute makes it a Class D felony for any person to knowingly use any communication system for the purpose of procuring or promoting the use of a minor for sexual

activity, or a peace officer posing as a minor for sexual activity if the person believes that the peace officer is a minor or is wanton or reckless in that belief.

I believe that Perverted Justice, through its association with law enforcement, could be considered an agent of law enforcement for purposes of the statute. However, Stone made no argument in regard to KRS 510.155 to the trial court and, thus, the majority ignores it implications. The reason I believe it worthy of mention is that merely because there was no police officer involved in the internet communications, Stone was prosecuted for a Class C felony.

It is in explicable that the legislature intended that the same conduct engaged in by Stone is a Class D felony when the communication is with a police officer posing as a child but a Class C felony when the communication is with a private citizen or, in this case, a member of Perverted Justice. Because the actor's intent is the same whether a private citizen or a police officer solicits the defendant, and the crime just as repugnant, the punishment should not be premised on the identity of the child imposter.

The parameters of KRS 510.155 are yet to be judicially tested. For the reasons stated, the statute poses potential inconsistencies in the punishment for the same conduct and, therefore, should be amended to include a situation such as that presented.

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