ADVANCE SHEET HEADNOTE
May 28, 2024

2024 CO 32

No. 23SC51, *People v. Johnson*—Enticement of a Child—Attempt to Invite or Persuade a Child—Attempt as Completed Offense—Sufficiency of the Evidence.

The supreme court considers whether the court of appeals erred in concluding that the evidence was not sufficient to support the defendant's conviction for enticement of a child, § 18-3-305(1), C.R.S. (2023). First, the supreme court rejects the court of appeals' reading of the word "attempt" in section 18-3-305(1) as referring to the inchoate crime of "attempt" defined in section 18-2-101(1), C.R.S. (2023). Instead, the court interprets "attempt" under section 18-3-305(1) in accordance with its plain meaning.

The court then holds that the defendant's words and actions, taken together and viewed in the light most favorable to the prosecution, constitute sufficient evidence for a reasonable person to conclude that the defendant attempted to invite or persuade the victim to enter his vehicle with the intent to commit unlawful sexual contact upon her. Therefore, the court reverses the court of

appeals' decision vacating the defendant's conviction on sufficiency grounds and remands the case to the court of appeals to address his remaining appellate arguments.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2024 CO 32

Supreme Court Case No. 23SC51
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 20CA764

Petitioner:

The People of the State of Colorado,

v.

Respondent:

James Clayton Johnson.

Judgment Reversed
en banc
May 28, 2024

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JUSTICE MÁRQUEZ delivered the Opinion of the Court, in which **CHIEF JUSTICE BOARTRIGHT**, **JUSTICE HOOD**, **JUSTICE HART**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.

JUSTICE MÁRQUEZ delivered the Opinion of the Court.

¶1 When James Clayton Johnson noticed ten-year-old A.W. walking her dog, he drove into the opposing lane of traffic to pull his truck up beside her. Johnson commented on her dog and asked for its name. He then asked A.W. for her name, age, and address. Upon hearing her response, Johnson remarked that ten was "the perfect age for a boyfriend." He then asked A.W. if she had ever "touched it." Alarmed, A.W. walked away. Based on these events—supplemented by CRE 404(b) evidence of Johnson's previous behavior with a five-year-old girl in Louisiana—a jury convicted Johnson of enticement of a child under section 18-3-305(1), C.R.S. (2023).

¶2 A division of the court of appeals vacated Johnson's conviction on the ground that the evidence was insufficient to prove the offense of enticement. *People v. Johnson*, 2022 COA 139, ¶¶ 33–34, 525 P.3d 1106, 1112. Specifically, the division concluded that Johnson's conduct with A.W., taken together with the CRE 404(b) prior act evidence (assuming it was properly admitted), was insufficient to show that Johnson had attempted to invite or persuade A.W. to enter his truck, or that he intended to commit unlawful sexual contact. *Id.* at ¶¶ 23, 33, 525 P.3d at 1111–12. Accordingly, the division vacated Johnson's conviction without addressing his challenge to the admissibility of the CRE 404(b) evidence or the merits of his other arguments on appeal. *Id.* at ¶¶ 7, 34, 525 P.3d at 1108,

1112. We granted the People's petition for certiorari to review the division's sufficiency determination.[1]

¶3 Viewing the evidence in the light most favorable to the prosecution, as our sufficiency standard requires, *Manjarrez v. People*, 2020 CO 53, ¶ 20, 465 P.3d 547, 551, we hold that the division erred in concluding that the evidence was insufficient to sustain Johnson's conviction. We therefore reverse the division's sufficiency determination, reinstate Johnson's conviction, and remand the case to the court of appeals to evaluate Johnson's remaining arguments on appeal.

I. Facts and Procedural History

¶4 Ten-year-old A.W. was walking her dog near her home when a black truck crossed into an opposing lane of traffic to pull up beside her. The truck stopped about two feet away from A.W. with the driver-side window facing her. The driver, later identified as Johnson, rolled down his window and began to talk to her.

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[1] Specifically, we granted certiorari to review the following issue:

> 1. Whether the court of appeals erred when it concluded that seeking out a 10-year-old victim, driving up to her, and engaging her in a sexually charged conversation did not constitute an attempt to invite the child to enter the vehicle with the intent to commit sexual assault or unlawful sexual contact for purposes of the enticement-of-a-child statute.

¶5 Johnson told A.W. that her dog was cute and asked for the dog's name. He also whistled or clicked his tongue toward the dog, but the dog did not respond.

¶6 The conversation then took a concerning turn. First, Johnson asked for A.W.'s name, age, and address. Upon hearing that she was ten, he commented that ten was "the perfect age for a boyfriend." He then asked A.W., "Have you ever touched it," apparently referring to a penis, and told her that he was "just curious." During this conversation, Johnson turned to face A.W., leaning both his arms on the window frame, only a few feet from A.W. However, Johnson never left his truck, opened the door, offered A.W. anything, asked her to enter the truck, touched her, or otherwise reached out toward her.

¶7 Feeling "terrified," A.W. walked away, taking care not to walk toward her home to avoid revealing to Johnson exactly where she lived. Johnson began to drive away, watching her in his side mirror as she walked. Their interaction lasted a little more than one minute.

¶8 Based on this encounter, the People charged Johnson with one count of enticement of a child pursuant to section 18-3-305(1). At trial, the jury heard testimony from, among others, A.W., A.W.'s mother, and two neighbors whose home security cameras captured video of the incident.

¶9 The People also introduced CRE 404(b) evidence of a separate incident that occurred in Louisiana in 2017. There, Johnson persuaded a five-year-old girl to

get into his car so he could take her home. He instead drove her to a nearby store and kissed her on the lips before telling her to get out of the car.[2] The trial court admitted this evidence for the limited purposes of proving Johnson's identity and showing that Johnson possessed the intent the child enticement statute requires.

¶10 The jury found Johnson guilty, and the court sentenced him to six years to life in the custody of the Department of Corrections. Johnson appealed, arguing primarily that the People's evidence was insufficient to support his conviction. *Johnson*, ¶ 7, 525 P.3d at 1108. In addition, Johnson argued that the trial court reversibly erred by (1) admitting the CRE 404(b) evidence, (2) failing to instruct the jury as to the definition of "propensity," and (3) denying Johnson's request for substitute counsel when Johnson raised concerns about the quality of his communications with his public defender. *Id.* The division ultimately agreed with Johnson's primary contention and vacated his conviction on sufficiency grounds. *Id.* at ¶¶ 33–34, 525 P.3d at 1112.

¶11 First, the division evaluated whether Johnson's conduct amounted to an "attempt[] to invite or persuade" A.W. to enter his truck. *Id.* at ¶¶ 16–17, 525 P.3d at 1110. In conducting this analysis, the division emphasized actions Johnson did

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[2] Johnson was charged with aggravated kidnapping as a result of this incident and had been released on bail at the time he allegedly committed enticement in Colorado. Accordingly, the People also charged Johnson with violating bail bond conditions. The trial court bifurcated the trial on this charge, however, and the People dismissed it after the jury convicted Johnson of enticement.

not take, such as saying anything about his truck, gesturing for A.W. to enter, moving toward A.W. or the door of the truck, opening the door to allow her to enter, stepping out of the truck, asking her to stop walking away, or following her as she did so. *Id.* at ¶ 21, 525 P.3d at 1110–11. Then, looking to Colorado's statutory definition of criminal attempt, the division concluded that "without more," Johnson's "highly inappropriate" statements to A.W. were not "'strongly corroborative'" of a "'firmness of . . . purpose to'" invite or persuade A.W. to enter his truck. *Id.* at ¶¶ 21–22, 525 P.3d at 1110–11 (quoting § 18-2-101(1), C.R.S. (2023), which defines criminal attempt). The division further reasoned that Johnson's statements did not suffice to show that he had taken "'all steps preparatory' to the offense of enticement of a child." *Id.* at ¶ 23, 525 P.3d at 1111 (quoting *People v. Miranda*, 2014 COA 102, ¶ 78, 410 P.3d 520, 535). Thus, the division concluded, the evidence did not establish that Johnson had engaged in conduct constituting the "substantial step" necessary to convict a person of criminal attempt. *Id.* at ¶¶ 18, 23, 525 P.3d at 1110–11 (quoting § 18-2-101(1)).

¶12 The division also considered whether the evidence established that Johnson acted with the requisite intent to prove enticement of a child. *Id.* at ¶ 24, 525 P.3d at 1111. The division reasoned that, even if Johnson's statements indicated that he had sexual thoughts about A.W., there was "too large an inferential leap between those thoughts and a formed intent to act upon them by committing sexual assault

or engaging in an unlawful sexual contact." *Id.* at ¶ 25, 525 P.3d at 1111. The division further reasoned that the CRE 404(b) evidence, even if properly admitted, also did not prove that Johnson intended to engage in unlawful sexual contact with A.W. *Id.* at ¶¶ 30–32, 525 P.3d at 1112.

¶13 The division thus vacated Johnson's conviction on sufficiency grounds without addressing Johnson's other appellate contentions. *Id.* at ¶¶ 12, 34, 525 P.3d at 1109, 1112. We granted the People's petition for certiorari review.

II. Analysis

¶14 Our analysis begins with the child enticement statute:

> A person commits the crime of enticement of a child if he or she invites or persuades, *or attempts to invite or persuade*, a child under the age of fifteen years to enter any vehicle, building, room, or secluded place *with the intent to commit* sexual assault or *unlawful sexual contact* upon said child.

§ 18-3-305(1) (emphases added). The People confine their argument to a narrow theory under this statute: that the evidence was sufficient to show that Johnson (1) *attempted* to invite or persuade A.W. to enter his truck (2) with the intent to commit *unlawful sexual contact*. We therefore confine our analysis to this theory.

¶15 First, we set forth our standard of review. Then, as a prerequisite to our review of the division's sufficiency determination, we interpret the "attempt" language in the child enticement statute. We hold that, in this context, "attempt"

does not refer to a criminal attempt as defined in section 18-2-101(1), but rather to its plain language definition.

¶16 Next, we turn our attention to the facts of this case and to each prong of the People's theory. We conclude that a reasonable person could have found that the combination of Johnson's words and conduct, viewed in the light most favorable to the prosecution, amounted to an attempt to invite or persuade A.W. to enter Johnson's truck. We then explain how this same evidence could support a reasonable person's conclusion that Johnson acted with intent to commit unlawful sexual contact. Accordingly, we hold that the evidence was sufficient to support Johnson's conviction.

A. Standard of Review

¶17 We review a lower court's interpretation of a statute de novo. *McCoy v. People*, 2019 CO 44, ¶ 37, 442 P.3d 379, 389. "When the statutory language is unambiguous, we apply the plain and ordinary meaning of the provision." *People v. Lee*, 2020 CO 81, ¶ 11, 476 P.3d 351, 354. To discern the ordinary meaning, we "construe undefined words and phrases according to their common usage." *Id.* (quoting *People v. Griego*, 2018 CO 5, ¶ 25, 409 P.3d 338, 342).

¶18 We review de novo whether the prosecution presented sufficient evidence to sustain a conviction. *See Manjarrez*, ¶ 20, 465 P.3d at 551. In so doing, we must determine whether the relevant evidence, when viewed as a whole in the light

most favorable to the prosecution, is sufficient to allow a reasonable person to conclude that the defendant is guilty of the charges beyond a reasonable doubt. *Id.*; *People v. Douglas*, 2012 COA 57, ¶ 7, 296 P.3d 234, 240. "We may not serve as the 'thirteenth juror' to weigh various pieces of evidence or resolve conflicts in the evidence." *Butler v. People*, 2019 CO 87, ¶ 20, 450 P.3d 714, 718 (quoting *People v. Sprouse*, 983 P.2d 771, 778 (Colo. 1999)).

B. Section 18-3-305(1) Criminalizes an "Attempt" to Entice a Child as a Completed Offense and Does Not Refer to the Formal Definition of Criminal Attempt

¶19 Section 18-3-305(1) forbids an "attempt[] to invite or persuade" a child to enter a vehicle with the intent to commit sexual assault or unlawful sexual contact upon that child. The division understood this language to incorporate Colorado's statutory definition of criminal attempt found in section 18-2-101(1). *See Johnson*, ¶ 18, 525 P.3d at 1110. Under that statute, "[a] person commits criminal attempt if, acting with the kind of culpability otherwise required for commission of an offense, [they] engage[] in conduct constituting a *substantial step* toward the commission of the offense." § 18-2-101(1) (emphasis added). "A substantial step is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose *to complete the commission of the offense*." *Id.* (emphasis added).

¶20 Neither the People nor Johnson challenges the division's interpretation of the child enticement statute's "attempt" language. However, "a case raising a sufficiency of the evidence challenge ultimately requires a court to decide whether the defendant committed any crime at all." *McCoy*, ¶ 26, 442 P.3d at 387. Properly answering that question here requires us to interpret the child enticement statute.

¶21 Section 18-3-305(1) makes clear that a defendant's mere "attempt[] to invite or persuade" violates the child enticement statute. Yet the division's interpretation incorporated the definition of the *inchoate* crime of criminal attempt. Another division of the court of appeals explored the consequences of importing this same definition into section 18-8-306, C.R.S. (2023), which criminalizes *attempts* to influence (but not actually influencing) a public officer. *People v. Riley*, 2015 COA 152, ¶¶ 26–30, 380 P.3d 157, 163–64. In considering whether the trial court erred by failing to instruct the jury on the definition of attempt in accordance with the criminal attempt definition, the *Riley* division held that construing the "attempt" language in section 18-8-306 as a reference to the criminal attempt statute would "lead[] to an illogical or absurd result" because it would require identifying conduct constituting a "substantial step" toward commission of an "attempt" to influence a public servant. *Id.* at ¶ 29, 380 P.3d at 164 (first quoting *Frazier v. People*, 90 P.3d 807, 811 (Colo. 2004); and then quoting § 18-2-101(1)); *accord People v. Knox*, 2019 COA 152, ¶ 34, 467 P.3d 1218, 1225 (resorting to

dictionaries to define "attempt" in the same statute). Four years earlier, however, another division examining the same statute cited section 18-2-101(1) as the relevant definition of "attempt" without questioning the implications of that interpretation. *People v. Tucker*, 232 P.3d 194, 200–01 (Colo. App. 2009).[3]

¶22 Reflecting on this conflicting case law, another division recently noted that "[w]hen the elements of a crime include the term 'attempt,' the definition of the inchoate offense of criminal attempt may not apply." *People v. Snider*, 2021 COA 19, ¶ 65 n.5, 491 P.3d 423, 436 n.5 (citation omitted). The *Snider* division offered this observation in the context of interpreting Colorado's statutory prohibition on resisting arrest, § 18-8-103(1), C.R.S. (2023), which, like the child enticement statute, criminalizes both preventing *and* attempting to prevent law enforcement from effecting an arrest. *Snider*, ¶ 65, 491 P.3d at 436. Ultimately, the division did not resolve the issue because doing so was not necessary to decide the case before it. *Id.* at ¶ 65 n.5, 491 P.3d at 436 n.5. Here, however, a proper evaluation of the division's decision on Johnson's sufficiency claim requires us to

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[3] *Tucker* involved a sufficiency challenge to the defendant's conviction under section 18-8-306 for attempting to influence a public servant. *Tucker*, 232 P.3d at 200–01. There, the defendant asserted, *inter alia*, that his conduct did not constitute a "substantial step." *Id.* at 201. Thus, the *Tucker* division's purpose in citing to the criminal attempt statute appears to have been to respond to the defendant's argument, rather than to affirmatively define "attempt" in the context of section 18-8-306. *See Riley*, ¶ 28 n.3, 380 P.3d at 163 n.3 (distinguishing *Tucker* on these grounds).

construe "attempt" in the child enticement statute. *See McCoy*, ¶¶ 26–27, 442 P.3d at 387 (indicating that resolving questions of statutory interpretation are sometimes prerequisites to evaluating sufficiency claims).

¶23 We find the *Riley* division's concerns regarding the application of the statutory definition of "attempt" to section 18-8-306 (the statute criminalizing an attempt to influence a public servant) persuasive and equally applicable here. Under section 18-3-305(1), an "attempt[] to invite or persuade" by itself constitutes the *completed* offense of child enticement. Therefore, applying section 18-2-101(1) to the enticement statute requires asking whether the defendant engaged in "conduct constituting a substantial step toward the commission of the offense" of *attempting* to invite or persuade—the same result the *Riley* division deemed "illogical" in the context of section 18-8-306. *Riley*, ¶ 29, 380 P.3d at 164 (first quoting section 18-2-101(1); and then quoting *Frazier*, 90 P.3d at 811).

¶24 The division avoided this result by merely substituting section 18-2-101(1)'s language for the word "attempt" in section 18-3-305(1). But that reading essentially transforms the offense with which Johnson was convicted into the *inchoate* crime of taking a "substantial step" that was "strongly corroborative of the firmness of [his] purpose to complete the commission of the offense" of enticement. *See* § 18-2-101(1). To give effect to the language of section 18-3-305(1), there must exist a distinction between the *inchoate* crime of an attempt to invite or

persuade, and the *completed* crime of enticement that is based on an attempt to invite or persuade.

¶25 We acknowledge that section 18-8-306 differs from the child enticement statute in that the child enticement statute *also* criminalizes the crime of *actually* inviting or persuading a child to enter a vehicle. But the *Snider* division suggested that this distinction does not render the *Riley* division's concerns inapplicable. *Snider*, ¶ 65 n.5, 491 P.3d at 436 n.5 (discussing section 18-8-103(1), which similarly criminalizes both attempting to resist arrest and actually resisting arrest). The fact that the child enticement statute deems an "attempt[] to invite or persuade" a *completed* offense suffices to conclude that interpreting "attempt" by reference to the statute criminalizing *inchoate* offenses is inappropriate and can produce illogical results.

¶26 The court of appeals' prior decisions in *People v. Vecellio*, 2012 COA 40, 292 P.3d 1004, and *People v. Grizzle*, 140 P.3d 224 (Colo. App. 2006), do not persuade us otherwise. The division here relied on these cases to explain that courts "analyze[] the enticement statute's 'attempt' language in conjunction with the criminal attempt statute." *Johnson*, ¶ 18, 525 P.3d at 1110 (alteration in original) (first quoting *Vecellio*, ¶ 45, 292 P.3d at 1015; and then citing *Grizzle*, 140 P.3d at 226). But *Vecellio* and *Grizzle*, which involved internet "sting" operations in which law enforcement officers posed as the purported child victims of enticement

(or as parents offering their children as potential victims), looked to the criminal attempt statute only for the proposition that factual and legal impossibility are not affirmative defenses to criminal attempt; neither decision adopted or relied upon the "substantial step" definition to interpret the elements of the offense of enticement. *Vecellio*, ¶ 46, 292 P.3d at 1015; *Grizzle*, 140 P.3d at 226.

¶27 For these reasons, we reject the division's interpretation of the child enticement statute as incorporating the statutory definition of criminal attempt found in section 18-2-101(1). Instead, we interpret "attempt" in accordance with its plain meaning. *Lee*, ¶ 11, 476 P.3d at 354. An "attempt" is an "act or an instance of making an effort to accomplish something, esp. without success." *Attempt*, Black's Law Dictionary (11th ed. 2019); *see also Attempt*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/attempt [https://perma.cc/VUC3-GAU5] (defining "attempt" as "to make an effort to do, accomplish, solve, or effect"); *Knox*, ¶ 34, 467 P.3d at 1225 (relying on dictionary definitions of "attempt" in the context of the statute criminalizing attempts to influence a public official).

¶28 Accordingly, we hold that a person violates section 18-3-305(1) if they make an effort to invite or persuade a child to enter their vehicle with the requisite

intent.[4] Having adopted this interpretation of the child enticement statute, we now apply it to the evidence of Johnson's conduct.

C. Sufficient Evidence Supports the Conclusion that Johnson Attempted to Invite or Persuade A.W. to Enter His Truck

¶29 The People argue that the division's analysis ignored the language of the enticement statute by effectively requiring that the People prove Johnson *actually* invited or persuaded A.W. to enter his truck. Further, they contend that the division focused too much on what Johnson said and not enough on his actual behavior during the encounter, while emphasizing actions Johnson did *not* take. This reasoning, the People maintain, reached beyond the bounds of the deferential sufficiency standard by weighing the available evidence differently than the jury did. We agree.

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[4] Our interpretation of the child enticement statute's "attempt" language is consistent with evidence in the record suggesting that the trial court and the parties treated that language consistent with its ordinary, everyday meaning. During closing arguments, the People neither cited section 18-2-101(1) nor employed its "substantial step" or "firmness of purpose" language. Neither party objected to the child enticement instruction (which merely listed an "attempt[] to invite or persuade" as one way to commit enticement), nor did either party request a separate jury instruction on the definition of criminal attempt based on section 18-2-101(1). And because Johnson's defense theory focused on identity, his closing arguments did not address the attempt language. The record thus indicates that, consistent with the parties' and the court's intent, the jury understood "attempt" in the context of the enticement statute in accordance with its ordinary meaning.

¶30 In light of our interpretation of "attempt" in section 18-3-305(1), we conclude that Johnson's words and actions, when viewed collectively and in the light most favorable to the prosecution, were sufficient to allow a reasonable person to conclude that Johnson made an effort to invite or persuade A.W. to enter his vehicle. Johnson crossed into an oncoming lane of traffic to pull up beside A.W., stopping mere feet away from her. He then whistled or clicked his tongue toward A.W.'s dog, as if calling the dog to draw A.W. closer. Finally, while leaning on the window frame of his truck, Johnson asked A.W. personal questions that veered into sexual territory, culminating in whether she "ha[d] ever touched it." Viewing this evidence in the light most favorable to the People, a reasonable person could conclude that Johnson was steering the conversation toward asking A.W. to enter Johnson's truck—likely so she could "touch it."

¶31 Contrary to Johnson's argument, our view of the evidence does not rely on speculation or conjecture; it relies on the sufficiency standard. Under that standard, "[i]t does not matter that, were we the trier of fact, we might have reached a different conclusion." *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010). Rather, our mandate is to "give the prosecution the benefit of every reasonable inference which may be fairly drawn from the evidence" and ask whether, viewed as such, "a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 1291–92.

¶32 The division did not draw all reasonable inferences in favor of the prosecution from the actions Johnson *did* take; instead, it focused on the actions Johnson did *not* take while discounting the significance of the "highly inappropriate," suggestive words he spoke. *Johnson*, ¶ 22, 525 P.3d at 1111. This view of the evidence impermissibly substituted the division's weighing of the evidence for the jury's.

¶33 A faithful application of the sufficiency standard mandates the result here. Accordingly, we hold that the evidence was sufficient to conclude that Johnson attempted to invite or persuade A.W. to enter his truck.

D. Sufficient Evidence Supports the Conclusion that Johnson Acted with Intent to Commit Unlawful Sexual Contact

¶34 The People's argument concerning Johnson's intent resembles their argument concerning his attempt. Viewed in the context of his actions, the People argue that the evidence of Johnson's statements is sufficient to permit a reasonable person to conclude that he intended to commit unlawful sexual contact against A.W. Under the facts of this case, we agree.

¶35 A person can violate the child enticement statute only if they act with the requisite intent—as relevant here, to commit "unlawful sexual contact." § 18-3-305(1); *People v. Walker*, 321 P.3d 528, 542 (Colo. App. 2011), *vacated on other grounds*, 2014 CO 6, ¶ 2, 318 P.3d 479, 481. "Unlawful sexual contact" occurs in a

variety of circumstances, including when a person "knowingly subjects a victim to any sexual contact" knowing that the victim does not consent or is "incapable of appraising the nature of the victim's conduct." § 18-3-404(1)(a), (b), C.R.S. (2023). "Sexual contact," in turn, occurs when the actor knowingly touches the victim's intimate parts, the victim touches those of the actor, or when there is touching of "the clothing covering the immediate area of the victim's or actor's intimate parts . . . for the purposes of sexual arousal, gratification, or abuse." § 18-3-401(4)(a), C.R.S. (2023).

¶36 "A person acts 'intentionally' or 'with intent' when his conscious objective is to cause the specific result proscribed by the statute defining the offense." § 18-1-501(5), C.R.S. (2023). Direct evidence of an individual's intent, such as an admission of their purpose in performing the prohibited act, is rare; consequently, "a defendant's intent can, and often must, be proved by circumstantial evidence." *People in Int. of J.O.*, 2022 COA 65M, ¶ 20, 517 P.3d 1259, 1263 (citing *People v. Taylor*, 655 P.2d 382, 384 (Colo. 1982)). For example, evidence that the defendant actually completed the prohibited conduct is sufficient to conclude that the defendant possessed the intent required for an enticement conviction. *E.g.*, *People v. Pifer*, 2014 COA 93, ¶ 17, 350 P.3d 936, 939 (concluding that the defendant intended to commit sexual assault based on evidence that he had exposed himself while

inviting children into his apartment where he sexually assaulted or contacted them).

¶37 But completed conduct is not the only form of circumstantial evidence that will support a finding of intent. *See* § 18-1-501(5) ("It is immaterial to the issue of specific intent whether or not the [statutorily proscribed] result actually occurred."). In enticement cases, the court of appeals has held that the evidence was sufficient to support the defendant's conviction where the defendant described the sexual acts in which he hoped to engage the victim, requiring nothing more to prove intent. *Douglas*, ¶¶ 6, 18, 296 P.3d at 240, 242 (rejecting the defendant's sufficiency claim where the defendant's sexually explicit conversation with the victim's mother described sexual acts he wished to perform with the victim); *Vecellio*, ¶¶ 42, 48, 292 P.3d at 1015–16 (rejecting the defendant's sufficiency claim where the defendant's conversations with the victim described his plan to sexually assault her). Even absent descriptions of specific sexual acts, courts have relied, at least in part, on defendants' explicit sexual conversations with child victims to find the requisite intent to support a conviction under enticement and enticement-like statutes. *See, e.g.*, *State v. Pask*, 781 N.W.2d 751, 752, 755–56 (Wis. Ct. App. 2010) (holding that the evidence was sufficient to convict the defendant of enticement where he commented to children, "look at those sexy little salty kids," and offered them candy while standing five to six feet

from them and gesturing toward a sheltered area); *State v. McGrath*, 574 N.W.2d 99, 100–01 (Minn. Ct. App. 1998) (citing the defendant's sexually explicit dialogue, his bumping of one of the children's hips, and other bad-acts evidence, as sufficient to infer that the defendant intended to engage in sexual conduct with the children).

¶38 Viewed through the prism of the sufficiency standard, the substance and circumstances of Johnson's encounter with A.W. evince his intent to commit unlawful sexual contact in much the same way as did the evidence in *Pask* and *McGrath*. As in those cases, Johnson's overtly sexual statements—including describing A.W. as being "the perfect age for a boyfriend" and asking if she had ever "touched it"—indicated the nature of his interest in A.W.

¶39 While we agree with the division that the mere fact that Johnson had "sexual thoughts while speaking with A.W." would not be sufficient to show "that he intended to act upon such thoughts," *Johnson*, ¶ 29, 525 P.3d at 1112, the evidence goes beyond Johnson's words. Johnson made these statements after pulling into an opposing lane of traffic to park next to A.W. with his driver-side window directly adjacent to her. He made them while leaning on the window frame of his truck toward A.W., who stood just a few feet away at the time. He made them after seeking to draw her closer by whistling or clicking his tongue at her dog. And he made them only after asking A.W. a series of questions that quickly

escalated in intimacy and that appeared to be designed to compliment her and make her feel more comfortable in his presence. Given this context, Johnson's question about whether A.W. had ever "touched it" can reasonably be viewed as the beginning of an invitation to do precisely that. And because that would constitute unlawful sexual contact, we conclude that the evidence was sufficient to prove that Johnson acted with the intent the child enticement statute requires.[5]

III. Conclusion

¶40 We conclude that the division erred in interpreting the "attempt" language in section 18-3-305(1) as incorporating the definition of an inchoate criminal attempt under section 18-2-101(1). Instead, we define "attempt," in this context, in accordance with its plain and ordinary meaning: "to make an effort" to invite or persuade.

¶41 Under this definition, we hold that the evidence was sufficient to support Johnson's conviction for enticement of a child under section 18-3-305(1). Accordingly, we reverse the court of appeals' decision to the extent that it vacated Johnson's conviction on sufficiency grounds. We remand the case to the court of appeals to address Johnson's remaining appellate arguments.

[5] We do not rely on the CRE 404(b) evidence to reach our conclusion.