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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

STEVEN A. SCHWOERER, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D19-2010

Opinion filed January 8, 2021.

Appeal from the Circuit Court for Sarasota County; Charles E. Roberts, Judge.

Howard L. Dimmig, II, Public Defender, and Kevin Briggs, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Kiersten E. Jensen, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

After a bench trial, Steven A. Schwoerer was convicted of multiple sex offenses, all of which the charging information alleged to have occurred "on or about" the same date. On this appeal of the judgment and sentence, Schwoerer argues that two of his convictions—those for use of a computer to seduce/solicit/entice a child to

commit a sex act, in violation of section 847.0135(3)(a), Florida Statutes (2018) ("solicitation"), and for unlawful use of a two-way communications device, in violation of section 934.215, Florida Statutes (2018) ("unlawful use")—violated double jeopardy. Because it was not clear from the information that different conduct underlay each charge, we reverse Schwoerer's conviction and sentence for unlawful use and remand for resentencing pursuant to a corrected scoresheet. In all other respects, we affirm.

Sarasota Police Department Detective Megan Buck, an internet crimes task force agent, created a profile for "Kelsey" on an online dating website. Although the profile listed "Kelsey's" age as twenty-two, "Kelsey's" profile picture was of a girl about fourteen years old.[1]

On October 6, 2018, at 8:01 p.m., after "Kelsey" had accepted Schwoerer's online friend request and invited him to text her, Schwoerer texted, "Hey sexy it's Steven." "Kelsey" quickly confessed to being only fourteen years old, and Schwoerer responded: "Cool. You are a naughty little girl I see I like it."

Schwoerer and "Kelsey" continued to text consistently through the night and the next day, October 7. During the conversation, "Kelsey" repeatedly made references and used language consistent with being a fourteen-year-old girl. Acknowledging her inexperience and youth, Schwoerer explicitly described the sex acts he would like to perform with "Kelsey" and sent her sexually graphic memes and pictures, including of himself. Schwoerer and "Kelsey" made plans for him to meet with

[1]The picture was a childhood photograph of another law enforcement officer, who consented to its use.

her and her fifteen-year-old cousin at the beach the following weekend. At approximately 10:30 p.m. on October 7, the conversation stopped without explanation.

The conversation resumed at approximately 9:00 a.m. on October 9. Schwoerer continued to explicitly describe the sex acts he wanted to perform with "Kelsey" and her cousin, and he reiterated the plan to meet at the beach. This conversation ended at 6:20 p.m. on October 9. The conversation did not resume, and no meeting ever took place.

Schwoerer was arrested ten days later. In addition to the charges of solicitation and unlawful use, he was also charged with transmission of material harmful to minors, in violation of section 847.0138(2). The information alleged that Schwoerer had committed all of the offenses "on or about October 7, 2018."

During the bench trial, Schwoerer moved for a judgment of acquittal, arguing, among other things, that the charges for both solicitation and unlawful use violated the prohibition against double jeopardy because the elements of solicitation subsumed the elements of unlawful use. The trial court denied the motion "[b]ased on [its] review of the elements of each offense." The court made no findings with respect to what specific conduct underlay which offense.

Schwoerer renewed his motion posttrial, citing Mizner v. State, 154 So. 3d 391, 399 (Fla. 2d DCA 2014), for its holding that "proof of the unlawful use of a two-way communications device was subsumed within the proof of the soliciting . . . offense[]."[2] In response, the State directed the trial court to Lee v. State, 258 So. 3d 1297 (Fla.

[2]Although Mizner spoke in terms of the "proof" in "th[at] case," our actual analysis on that point was confined to the elements of the two offenses. See 154 So. 3d at 399.

2018), but urged the court, which was sitting as the trier of fact in a bench trial, to consider the evidence presented at trial and conclude that "there was sufficient evidence on each and every one of the counts." Although the State's argument is partially indiscernible in our record, the State specifically argued:

> If the Information is on the same (indiscernible), does (indiscernible) the same course of conduct on the same day, then the reviewing court be found [sic] to find that there is a double-jeopardy issue.
>
> That is clearly not the case here. You, Your Honor, have the advantage of hearing all of the evidence. And in fact in your judgment, you specifically stated that when one looks at the elements of each of these offenses, and looking at the communication, the sending of pictures, the State has clearly met its burden of proof beyond a reasonable doubt as to the elements in all three of the charges.
>
> So the evidence that you heard at bench trial satisfied this court that there was sufficient evidence on each and every one of the counts. The counts are not necessarily inclusive. They require different elements. . . .
>
> The Supreme Court says that a reviewing court is limited privy to the information. You are not a reviewing court for these purposes, Your Honor, because you heard the evidence, and you made findings that the State had satisfied its burden on each and every avenue to the [sic] each and every count.

The trial court denied Schwoerer's renewed motion, stating, "Having reviewed the Lee case, and looking at the evidence that was presented in this case, and my pronouncement back in April,[3] I will deny the renewed motion for judgment of acquittal." The court then sentenced Schwoerer to five years' imprisonment for solicitation, followed by a consecutive two years' imprisonment and then three years'

[3]The trial occurred on April 10, 2017. It is not clear to which pronouncement the court was referring.

probation for unlawful use, followed by a consecutive five years' probation for transmission of material harmful to minors.

This timely appeal followed. Schwoerer argues that we should reverse his conviction for unlawful use and remand for resentencing pursuant to a corrected scoresheet because convictions for both solicitation and unlawful use that arise out of the same criminal episode violate the prohibition against double jeopardy.

In Lee, the supreme court held that "to determine whether multiple convictions of solicitation of a minor . . . [and] unlawful use of a two-way communications device . . . are based upon the same conduct for purposes of double jeopardy, the reviewing court should consider only the charging document—not the entire evidentiary record." 258 So. 3d at 1304; see also id. at 1299 (same), 1304 (reiterating same). Explaining that "the issue 'is not one of *evidentiary sufficiency*' but of *'constitutional sufficiency*,' " id. at 1304 (quoting Lee v. State, 223 So. 3d 342, 375 (Fla. 1st DCA 2017) (Makar, J., concurring in part, dissenting in part)), the supreme court elaborated, "A reviewing court's ability to find evidence in the record to support multiple convictions is insufficient to defeat a double jeopardy claim when nothing in the charging document suggests that the convictions were based on separate conduct," id. at 1303–04.

In this case, the charging information alleged that each offense occurred "on or about October 7, 2018." The information, therefore, charges only a single criminal episode. See Mizner, 154 So. 3d at 400 (explaining that the State "charged [the offenses] as occurring during a single criminal episode" because it charged single

counts of each offense over the same span of days). Lee, therefore, dictates that Schwoerer be granted relief.

The State agrees that Lee applies in a jury trial in which a general verdict has been rendered on each count because in that context, the reviewing court "cannot infiltrate the black box of jury deliberation" to ascertain whether the jury found distinct factual bases for its verdicts on each count. But, it argues, "such a limitation is unwarranted when the [reviewing] court can discern from the jury verdict that the jury specially found that each act of criminality was distinct." And it argues further that "[w]hen rendering its verdict [in the bench trial in this case], the court, as the trier of fact, made clear that the convictions were based on separate and distinct acts of solicitation or enticement of a child. One criminal episode occurred . . . on October 7th and the other criminal episode occurred on October 9th."

We appreciate the State's logic, but although Lee itself arose in the context that the State identifies, the supreme court's holding that we, as the reviewing court, may look only to the charging document was neither limited nor qualified. To the contrary, it was unequivocal—so unequivocal that the court stated it three times in the opinion in nearly identical terms. See Lee, 258 So. 3d at 1299, 1304 (twice).

Moreover, even if we felt at liberty to accept the State's invitation to narrow Lee's holding, we would still conclude that Lee mandates reversal here. Contrary to the State's argument, the factual bases for the trial court's verdicts on the solicitation and unlawful use counts are not clear and distinct. The court made no express findings of fact in that regard either at trial or in connection with the renewed motion for judgment of acquittal. Rather, when all is said and done, surmising the possible factual bases for

the court's verdicts would require us to work backward from our own sufficiency-of-the-evidence-type review—the precise review that Lee expressly disapproved.

We therefore conclude that pursuant to Lee, Schwoerer's conviction for unlawful use must be reversed on double jeopardy grounds. Accordingly, we remand for the trial court to vacate his conviction and sentence for unlawful use and for resentencing pursuant to a corrected scoresheet. In all other respects, the judgment is affirmed.

Affirmed in part; reversed in part; remanded with directions.

LaROSE and SLEET, JJ., Concur.
ROTHSTEIN-YOUAKIM, J., Concurs specially.

ROTHSTEIN-YOUAKIM, J., Specially concurring.

I agree that pursuant to Lee, we are constrained to reverse Schwoerer's conviction for unlawful use. For the reasons set forth in Judge Winokur's concurrence in Lee v. State, 223 So. 3d 342, 361–63 (Fla. 1st DCA 2017), however, I recommend that the supreme court recede from the rationale of that decision. See also Newcombe v. State, 292 So. 3d 907, 909, 912–13 (Fla. 1st DCA 2020) (Thomas, B.L., J., concurring in result only) (recommending same).