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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001906-MR

WILLIAM CLARK — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN, III, JUDGE
ACTION NO. 07-CR-00340

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MOORE, AND STUMBO, JUDGES.

MOORE, JUDGE: William Clark appeals the judgment of the Daviess Circuit Court convicting him of the unlawful use of electronic means to induce a minor to engage in sexual activity or other prohibited activities. After a careful review of the record, we affirm because the evidence was sufficient to support his conviction, he was not entrapped, and the statute under which he was convicted is constitutional on its face and as applied to Clark.

I. PROCEDURAL BACKGROUND[1]

Clark was indicted on three charges of the unlawful use of electronic means to induce a minor to engage in sexual or other prohibited activities, in violation of KRS[2] 510.155. The parties agreed to merge the three counts together into a single count. Clark moved to have the statute declared unconstitutional both on its face and as applied to him, on the grounds that the statute was unconstitutionally vague and overbroad. The circuit court denied his motion. A jury trial was held, during which Clark moved for a directed verdict. The circuit court denied his motion for a directed verdict, and the jury ultimately convicted Clark. The circuit court sentenced him to two years of imprisonment.

Clark now appeals, contending that: (1) the circuit court erred in denying his motion for a directed verdict because the evidence was insufficient to convict him; (2) KRS 510.155 is unconstitutionally vague; (3) KRS 510.155 is unconstitutionally overbroad; and (4) he was entrapped.

II. ANALYSIS

A. CLAIM REGARDING MOTION FOR A DIRECTED VERDICT

[1] The relevant facts of this case will be discussed in the analysis portion of this opinion.

[2] Kentucky Revised Statute(s).

Clark first claims that the circuit court erred in denying his motion for a directed verdict because there was insufficient evidence to support his conviction.

> On motion for a directed verdict, the trial judge 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. The standard for appellate review of a denial of a motion for a directed verdict based on insufficient evidence is if, under the evidence as a whole, it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal.

Williams v. Commonwealth, 178 S.W.3d 491, 493-94 (Ky. 2005) (citations omitted).

Clark was convicted of violating KRS 510.155, which provides, in pertinent part:

> (1) It shall be unlawful for any person to knowingly use a communications system, including computers, computer networks, computer bulletin boards, cellular telephones, or any other electronic means, for the purpose of procuring or promoting the use of a minor, or a peace officer posing as a minor if the person believes that the peace officer is a minor or is wanton or reckless in that belief, for any activity in violation of . . . KRS 510.060 . . . KRS 510.090 . . . or KRS Chapter 531.
>
> . . . .
>
> (3) The solicitation of a minor through electronic communication under subsection (1) of this section shall be prima facie evidence of the person's intent to commit the offense even if the meeting did not occur.

Kentucky Revised Statute 510.060(1)(b) provides that: "A person is guilty of rape in the third degree when . . . [b]eing twenty-one (21) years old or more, he or she engages in sexual intercourse with another person less than sixteen (16) years old[.]" Kentucky Revised Statute 510.090(1)(b) provides: "A person is guilty of sodomy in the third degree when . . . [b]eing twenty-one (21) years old or more, he or she engages in deviate sexual intercourse with another person less than sixteen (16) years old[.]" Finally, KRS 531.310(1) states that "[a] person is guilty of the use of a minor in a sexual performance if he employs, consents to, authorizes or induces a minor to engage in a sexual performance."

"Sexual performance" is defined by KRS 531.300(6) as: "any performance or part thereof which includes sexual conduct by a minor." The term "performance" is defined in KRS 531.300(5) as: "any play, motion picture, photograph or dance."

Clark contends that he should have been convicted for his actions rather than for what he wanted to happen, and thus, because he never actually engaged in sexual relations or sodomy with the girl, and he never received a sexual photograph from her, there was insufficient evidence to convict him.

As previously mentioned, KRS 510.155 states that it is illegal for a person to knowingly use a computer "for the purpose of *procuring or promoting* the use of a minor, or a peace officer posing as a minor if the person believes that the peace officer is a minor" for activities such as third-degree rape, third-degree sodomy, or the use of a minor in a sexual performance. (Emphasis added). The

term "promote" is defined in KRS 531.300(7) as: "to prepare, publish, print, procure or manufacture, or to offer or agree to do the same." Although "procure" is not defined in the Kentucky Revised Statutes, the term is defined in the New World Dictionary of the American Language, Second College Edition (1978) as: "to get or bring about by some effort; obtain; secure."

Thus, to survive Clark's motion for a directed verdict, the Commonwealth merely had to produce evidence showing that Clark knowingly used a computer for the purpose of getting a minor, or a peace officer whom Clark believed was a minor, to take a sexually explicit photograph of herself. Therefore, a crime was committed if Clark merely intended to use the computer to get a minor to take a sexually explicit photograph of herself and, contrary to Clark's assertion, no actual photograph was required to be taken for his conviction under KRS 510.155 to withstand a challenge regarding the sufficiency of the evidence.

In the present case, Clark's amended indictment read as follows:

> That on or about or during and between March 17, 2007, and April 20, 2007, the above named defendant(s), William Kenneth Clark, committed the offense of Unlawful Use of Electronic Means to Induce a Minor to Engage in Sexual or Other Prohibited Activities when he knowingly used a computer, computer network, computer bulletin board, or any other electronic means for the purpose of procuring or promoting the use of a minor, or a peace officer posing as a minor, if believing that the peace officer was a minor or that he was wanton or reckless i[n] that belief, for any crime constituting

Third Degree Rape,[3] Third Degree Sodomy,[4] or Use of a Minor in a Sexual Performance.[5]

Regarding Clark's intent, the Kentucky Supreme Court has held that intent "may be inferred from the actions of a defendant or from the circumstances surrounding those actions." *Little v. Commonwealth*, 272 S.W.3d 180, 186 (Ky. 2008), *as modified on denial of reh'g*, (2009) (internal quotation marks omitted). "Likewise, intent may be inferred from the defendant's knowledge." *Id*. "Finally, we are mindful that a person is presumed to intend the logical and probable consequences of his conduct." *Id*. (internal quotation marks and brackets omitted).

Even if the evidence against a defendant is circumstantial, "a jury may make reasonable inferences from such evidence." *Dillingham v. Commonwealth*, 995 S.W.2d 377, 380 (Ky. 1999). Furthermore, "[q]uestions of credibility and weight of the evidence are for the jury." *Brown v. Commonwealth*, 789 S.W.2d 748, 750 (Ky. 1990).

In the present case, Clark, who was forty-seven years old at the time, contacted a girl[6] by e-mail whom he thought was sixteen years old after seeing her photograph on the social networking website "MySpace."[7] The girl did not

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[3] KRS 510.060 defines the crime of rape in the third degree.

[4] KRS 510.090 defines the crime of sodomy in the third degree.

[5] KRS 531.310 defines the crime of use of a minor in a sexual performance.

[6] Because the girl was a minor at the time he contacted her, we will not use her name in this opinion.

[7] Because Clark moved in the circuit court for a directed verdict, and in ruling on that motion, the circuit court was required to view the evidence in the light most favorable to the Commonwealth, we will only discuss the evidence that was favorable to the Commonwealth here for the purpose of determining whether the circuit court properly denied Clark's motion.

respond to his e-mail, so Clark sent her five more e-mails, telling her how beautiful he thought she was and asking to be her MySpace friend. The girl told her mother that the stranger had e-mailed her, and her mother contacted the Owensboro Police Department. An officer went to their home and read four undeleted messages on the girl's computer from Clark. The officer obtained information from Clark's MySpace page to learn that Clark was the person maintaining that page.

The officer then opened an e-mail account in the girl's name and, posing as the girl, sent an e-mail to Clark. This resulted in over twenty live chat sessions and multiple other e-mails between Clark and the officer (who continued to pose as the girl). The officer printed these chats and e-mails out, and they were introduced by the Commonwealth as evidence at trial. All of the chats and e-mails took place within a month.

Within the first couple of days of e-mailing and chatting online, Clark told the girl[8] that he thought she was gorgeous for someone her age and that he had "always loved girls in braces" because he found them "kinda sexy." He also asked her bra size within the first two days of chatting and, after she did not answer him the first time, he asked her bra size again a day or two later. In the course of their chat sessions, it was revealed to Clark that the girl was actually fifteen years old, rather than sixteen. Despite knowing her age, Clark continued to tell the girl

[8] Although Clark was not actually chatting with the girl during these chat sessions or in the e-mails, as he was actually chatting with the police officer who was posing as the girl, we will refer to the officer as the "girl," because Clark believed he was in contact with the minor girl at the relevant times discussed here.

repeatedly how gorgeous and sexy she was and that he was in love with her. The girl told Clark that she was in love with him, too. In their chats, Clark said things such as "[I] need to get a shower . . . want to join?" When the girl later informed Clark that she was a virgin, he told her that he preferred she was a virgin and that he could "mold" her.

The girl told Clark that she liked "thinking about [them] at ni[ght]," and Clark asked: "are you rubbing yourself when you think of us?" Clark asked the girl if she was looking forward to him taking her virginity[9] and he asked if she was "into girls."

During one chat session, Clark asked the girl to rub herself for him, he asked if she would like to do a strip tease for him, he told her she should wear thong undergarments instead of panties, and he asked her to take photographs for him of her "butt." During the same chat session, Clark asked the girl her bra size for the third time, and the following exchange took place:

[Clark]:	you're a 32b?
[Girl]:	a
[Clark]:	[I] bet those are so sexy!
[Girl]:	[I] hope u [sic] like them there [sic] kinda [sic] small
[Clark]:	pics. . . pics. . .

Thereafter, the chat continued, in which Clark asked the girl whether she masturbated and Clark told her he would perform oral sex on her.

[9] Clark and the girl frequently chatted about how they were going to have sex once she turned eighteen years old. Clark commented a couple of times about how he was worried that the girl he was "chatting" with online was actually a police officer because he knew that police officers sometimes posed as underage girls to catch men who were soliciting underage girls into performing various sexual acts.

Throughout the various chat sessions, Clark tells the girl on numerous occasions that she needs to get a camera so that she can take photographs of herself for only Clark to see. During one chat session, he asked if she would send him "'hot' pics," and the girl asked him what types of photographs he wanted, "x-rated, r-rated, or g-rated," to which Clark responded "all [of] the above." (Punctuation added). He then added that he wanted pictures of her in "really really really short shorts." (Sic.). Clark and the girl began referring to each other as "Daddy" and "whore," respectively. The following exchange subsequently took place (we have not corrected spelling, punctuation, or capitalization errors):

[Girl]:	what u want ur whore to do daddy?
[Clark]:	anything you'd like . . . what sounds hot to you?
[Girl]:	u want me to lick it
[Clark]:	yeeeeeeeeeeeees and i want to lick yours too
[Girl]:	I WANT THAT to
[Clark]:	*you gonna take pics of it?*
[Girl]:	u promise nobody except u will see them
[Clark]:	that's a given babe NOBODY. i'm stingy that way . . .
[Girl]:	ill try and do it for u then daddy
[Clark]	[thank you] whore

(Emphasis added).

Clark was convicted of violating KRS 510.155, which provides, in pertinent part:

> (1) It shall be unlawful for any person to knowingly use a communications system, including computers, computer networks, computer bulletin boards, cellular telephones, or any other electronic means, for the purpose of procuring or promoting the use of a minor, or a peace

> officer posing as a minor if the person believes that the peace officer is a minor or is wanton or reckless in that belief, for any activity in violation of . . . KRS 510.060 . . . KRS 510.090 . . . or KRS Chapter 531.
>
> . . . .
>
> (3) The solicitation of a minor through electronic communication under subsection (1) of this section shall be prima facie evidence of the person's intent to commit the offense even if the meeting did not occur.

Furthermore, KRS Chapter 531 provides, inter alia, that "[a] person is guilty of the use of a minor in a sexual performance if he employs, consents to, authorizes or induces a minor to engage in a sexual performance."

Because Clark asked the girl for pictures of "it," implying that he wanted photographs of her genitals, and he also asked for pictures of her breasts, buttocks, and other "x-rated" photographs, it was reasonable for a jury to find him guilty of the count charged. Consequently, the circuit court did not err in denying Clark's motion for a directed verdict.

B. CLAIM THAT KRS 510.155 IS UNCONSTITUTIONALLY VAGUE

Clark next alleges that KRS 510.155 is unconstitutionally vague both on its face and as applied to him. "To survive vagueness analysis a statute must provide 'fair notice' of prohibited conduct and contain 'reason-ably [sic] clear' guidelines to thwart 'arbitrary and discriminatory' enforcement." *Commonwealth v. Kash*, 967 S.W.2d 37, 42 (Ky. App. 1997).

1. Vague on its face

First, Clark contends that the statute is vague on its face.

> Unquestionably, criminal statutes must be sufficiently specific that an individual has fair notice of what conduct is forbidden. [T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. To assert a facial challenge to a statute as impermissibly vague, a complainant must show that the statute is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. Simply because a criminal statute could have been written more precisely does not mean the statute as written is unconstitutionally vague. Moreover, the United States Supreme Court has consistently held that a person to whose conduct a statute clearly applies cannot successfully challenge it for vagueness as applied to the conduct of others.

Id. at 43 (internal quotation marks and citations omitted).

We will again reiterate that KRS 510.155 provides, in pertinent part:

> (1) It shall be unlawful for any person to knowingly use a communications system, including computers, computer networks, computer bulletin boards, cellular telephones, or any other electronic means, for the purpose of procuring or promoting the use of a minor, or a peace officer posing as a minor if the person believes that the peace officer is a minor or is wanton or reckless in that belief, for any activity in violation of . . . KRS 510.060 . . . KRS 510.090 . . . or KRS Chapter 531.
>
> . . . .
>
> (3) The solicitation of a minor through electronic communication under subsection (1) of this section shall be prima facie evidence of the person's intent to commit the offense even if the meeting did not occur.

Upon reviewing the language of KRS 510.155, we find that Clark cannot show that the statute is vague in the "sense that no standard of conduct is specified at all." *Kash*, 967 S.W.2d at 43. Furthermore, it provides fair notice of the conduct that is forbidden, and the statute clearly applies to Clark's conduct; thus, he cannot successfully challenge it as being facially vague. *Id*. Consequently, this claim lacks merit.

2. Vague as applied

Clark also contends that KRS 510.155 is unconstitutionally vague as applied to him. We disagree. We find that the statute clearly specified the behavior that was prohibited. Moreover, Clark obviously knew that his actions were illegal because after requesting photographs of the girl's genitals, he subsequently told the girl he did not remember requesting such photographs, and when asked why he suddenly did not remember requesting them, Clark said it was because "if [the girl was] a cop. . . they print out everything that is typed for evidence . . . [and] with [the girl] being underaged . . . [he] watch[es] what [he] say[s]." Therefore, the statute is not vague as applied to Clark because he clearly understood that his conduct violated the law. *See generally Tobar v. Commonwealth*, 284 S.W.3d 133, 135-36 (Ky. 2009). Consequently, this claim lacks merit.

C. CLAIM THAT KRS 510.155 IS UNCONSTITUTIONALLY OVERBROAD

Next, Clark contends that KRS 510.155 is unconstitutionally overbroad. A challenge to a statute on the basis that it is overbroad is essentially an argument "that in an effort to control impermissible conduct, the statute also prohibits conduct which is constitutionally protected." *Kash*, 967 S.W.2d at 43 (internal quotation marks omitted). This Court has previously held, albeit in analyzing the vagueness of the statute, that "KRS 510.155 merely prohibits the use of electronic means to engage in or solicit already otherwise prohibited activities. As such, the First Amendment protections are not implicated." *Filzek v. Commonwealth*, No. 2008-CA-000536, 2009 WL 414462, *1 (Ky. App. Feb. 20, 2009), *disc. rev. denied* (Ky. Aug. 19, 2009). The *Filzek* case was ordered to be published by the Kentucky Supreme Court, and the case is now final.

Thus, because KRS 510.155 does not prohibit constitutionally protected conduct, Clark's claim that the statute is overbroad lacks merit.

D. CLAIM THAT HE WAS ENTRAPPED

Finally, Clark asserts that he was entrapped. The Commonwealth contends that Clark did not raise this defense in the circuit court and, thus, it is not preserved for appellate review. Clark did not challenge this assertion in his reply brief, and he did not contend that the circuit court's failure to *sua sponte* instruct the jury on the defense of entrapment was palpable error. Pursuant to RCr[10] 9.54(2),

> [n]o party may assign as error the giving or the failure to give an instruction unless the party's position has been

[10] Kentucky Rule(s) of Criminal Procedure.

> fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

Because Clark neither proffered nor requested a jury instruction on entrapment, this issue is unpreserved for appellate review. RCr 9.54(2); *see also Taylor v. Commonwealth*, 995 S.W.2d 355, 362 (Ky. 1999).

Regardless, even if we were to review this claim for palpable error, the claim lacks merit. Pursuant to RCr 10.26,

> [a] palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Regarding the defense of entrapment, the Kentucky Supreme Court has held that

> [e]ntrapment is a defense to a crime available to a defendant if [the defendant] was induced or encouraged to engage in [the criminal] conduct by a public servant seeking to obtain evidence against him for the purpose of criminal prosecution, and the defendant was not otherwise disposed to engage in such conduct at the time of the inducement. Entitlement to the defense requires satisfaction of both prongs of the test, inducement and absence of predisposition.

Morrow v. Commonwealth, 286 S.W.3d 206, 209 (Ky. 2009) (internal quotation marks and citation omitted).

The statute setting forth the defense of entrapment is KRS 505.010, which provides:

> (1) A person is not guilty of an offense arising out of proscribed conduct when:
>
> > (a) He was induced or encouraged to engage in that conduct by a public servant or by a person acting in cooperation with a public servant seeking to obtain evidence against him for the purpose of criminal prosecution; and
> >
> > (b) At the time of the inducement or encouragement, he was not otherwise disposed to engage in such conduct.
>
> (2) The relief afforded by subsection (1) is unavailable when:
>
> > (a) The public servant or the person acting in cooperation with a public servant merely affords the defendant an opportunity to commit an offense; or
> >
> > (b) The offense charged has physical injury or the threat of physical injury as one (1) of its elements and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment.
>
> (3) The relief provided a defendant by subsection (1) is a defense.

In the present case, Clark cannot show that he "was not otherwise disposed to engage in such conduct" at the time of the inducement or encouragement. Clark, who was forty-seven years old, made six attempts to contact a girl whom he did not know after seeing her photograph on MySpace,

despite knowing that she was a minor, and in those attempts to contact her, he told her he wanted to be her friend and that she was beautiful. Within a day or two of receiving his first reply e-mail from her, he told her she was gorgeous and "sexy," and he asked her bra size, without any inducements whatsoever from the police officer who was posing as the girl at the time. Therefore, we find that Clark was disposed to engage in such conduct, and we do not find that manifest injustice resulted from the circuit court's failure to *sua sponte* instruct the jury on the defense of entrapment.

Accordingly, the judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

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