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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000821-MR

ANTHONY D. DURRANT — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 13-CR-00300

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KRAMER, AND NICKELL, JUDGES.

KRAMER, JUDGE: Anthony Durrant appeals the Hardin Circuit Court's judgment convicting him of fourteen counts of Use of a Minor in a Sexual Performance; one count of Possession of Matter Portraying a Sexual Performance by a Minor; and four counts of Unlawful Use of Electronic Means to Induce a Minor to Engage in Sexual or Other Prohibited Activities. After a careful review

of the record, we affirm because the trial court did not abuse its discretion in allowing testimony using a spreadsheet of text messages and digital images; the trial court did not abuse its discretion in denying Durrant's motion for a mistrial; Durrant was not entitled to a lesser-included-offense instruction; and his constitutional rights were not denied as a result of alleged cumulative error.

I. FACTUAL AND PROCEDURAL BACKGROUND

The text messages central to this controversy were made using an application called TextPlus. They came to light after the child's brother saw inappropriate texts to and from Anthony Durrant on the child's cellular telephone. The child, who was a thirteen-year-old female at the time, had been a student of Durrant's the prior year. Her brother informed the child's uncle, who was one of her guardians.

The child's uncle then made a report of the messages to the authorities. Detective Brandon Jones of the Radcliff Police Department went to Durrant's school and questioned him about inappropriate contact with the child. According to Durrant's statements to Detective Jones (to which the Detective testified at trial) Durrant admitted having set up the TextPlus account with the child allegedly for a fieldtrip to Washington, D.C., (but Detective Jones later learned the child did not attend the trip); Durrant admitted that it was his TextPlus account and that no one else had access to it; and he stated that the child had sent him one picture of her in a bra using the TextPlus account. Regarding this last statement, Durrant told Detective Jones that he sent the image back to her and said

it was inappropriate. Durrant stated to Detective Jones that was the extent of the messages to and from the child regarding any alleged criminal activity.

Thereafter, Detective Jones executed a search warrant and sent a subpoena to TextPlus for the textual and digital communications on Durrant's TextPlus account. The records Detective Jones received from TextPlus showed that Durrant communicated exclusively with the child with this application. However, the one digital image noted *supra* about which Durrant had told Detective Jones did not actually exist in the TextPlus records. The records did show that the child had sent nineteen digital images of various parts of her body without clothing, including her breasts, buttocks and vaginal area on the TextPlus account. Durrant responded to a number of the images and texts from the child. The following quotations illustrate some of the text messages Durrant sent to the child: "would you be able to keep it quiet between you and me"; "never said I don't want it to happen, said I didn't want the jail thing to happen, is that so hard to understand"; "nice, side view?" (after the child sent a frontal view of her chest); "you have the lights off, it's a little dark" (after the child sent a side image of her breasts); "still a little dark, but that's cool, I can't wait to get that"; "send it already, why do you have to make things so complicated" (after the child sent a text asking if Durrant wanted a picture); "can't wait to touch them" (after the child sent a picture of her breasts to Durrant); "it would be so cool to slide in between that gap" (after the child sent Durrant a picture of her buttocks); "nice"; "ok, now you're straight teasing"; "I can't do anything about it, not complaining though."

Durrant was indicted on: fourteen counts of Use of a Minor in a Sexual Performance, Class B Felony; five counts of Possession of Matter Portraying a Sexual Performance by a Minor, Class D Felony; nine counts of Unlawful Use of Electronic Means to Induce a Minor to Engage in Sexual or Other Prohibited Activities, Class D Felony; one count of first-degree Sexual Abuse, Class D Felony; and one count of Tampering with Physical Evidence, Class D Felony.

During trial, the Commonwealth called Detective Jones as its first witness. He testified regarding Durrant's admission of setting up the TextPlus account and Durrant's statements that it was for students going on a field trip to Washington, D.C. However, upon investigating these statements, Detective Jones told the jury that the child at issue did not go on the field trip and that the records from TextPlus showed that Durrant communicated exclusively with the child on the TextPlus account. Detective Jones testified about executing a search warrant and subpoena to TextPlus to receive a copy of all the text messages and images on the account at issue. Jones told the jury that the image that Durrant informed the Detective about during his initial interview (*i.e.,* the alleged image of the child in a bra and Durrant's statement to her that it was inappropriate) did not actually exist in the records from TextPlus.

Durrant's counsel objected to any information from the records received from the search warrant issued to TextPlus, arguing they were not properly authenticated, were not records kept in the regular course of business,

were hearsay and violated the confrontation clause. The Commonwealth responded that the Detective had been able to observe the text messages and images on the child's phone and could testify to what he observed.[1] The Commonwealth further argued that it could authenticate the messages through the testimony of the child pursuant to *Simmons v. Commonwealth*, 2013 WL 674721, (Ky. Feb. 21, 2013)(2012-SC-000064-MR). The trial court overruled the motion noting that the Commonwealth had not introduced the document from TextPlus yet, so any objection was premature. Durrant's counsel also objected later and lodged a continuing objection to the spreadsheet from TextPlus. We note that Durrant's counsel wanted the documents to be made part of the record for purposes of appeal but not admitted into evidence. The record on appeal, however, does not contain any exhibits at all.

Thereafter, Detective Jones continued to testify about photographs he had personally taken of the messages and nude images on the child's cellular telephone. These photographs were introduced into evidence.

The Commonwealth then called the child to the witness stand. The Commonwealth used the spreadsheet documents from TextPlus almost exclusively to question the child. In essence, the child testified that she had no independent recollection of the individual messages or digital images. She did testify that she and Durrant had communicated through TextPlus. The Commonwealth generally

[1] In a bench conference, the Commonwealth informed the court that it had a certification from TextPlus regarding the spreadsheet. However, the Commonwealth never introduced the spreadsheet into evidence; accordingly, it did not submit the certification.

asked the child if she recognized the messages between her and Durrant; to which she responded that she did.

The child was then cross-examined by Durrant's counsel. Although Durrant complains of the Commonwealth's method of questioning the child, defense essentially used the exact same method with the child. We pause to note that Durrant's counsel used a transcription to question the child that they had prepared and turned over to the Commonwealth. We are not informed what this transcription was taken from but to be absolutely clear on this point we are left with the impression that it contained the same information as the spreadsheet from TextPlus. We are informed of this because when the Commonwealth, on rebuttal, compared a difference between the spreadsheet and the defense's transcription, defense counsel objected. A bench conference was held on the objection regarding whether the Commonwealth was inferring any type of inappropriate conduct on behalf of defense counsel in using a transcription that was different from the TextPlus spreadsheet. After hearing defense counsel on the issue, the court ruled that it was an inadvertent typographical error and informed the jury of such.

We also believe that it is significant to point out here that during the entirety of defense counsel's questioning of the child, using the aforementioned transcription, that defense counsel repeatedly referred to Durrant, by name, as the person either receiving or sending messages. For example, the questioning from defense counsel included:

"Your brother went through your app, is that right"

"Yes … sir"

"And, when he went through your app, that's when he saw these texts that you had sent to Mr. Durrant, is that right?

"Yes sir."

….

"Do you recognize this conversation on January 3?"

"Yes, sir?"

"This is what you said, and this is what Mr. Durrant said?"

"Yes, sir?"

….

"On January 4th, do you recognize that conversation between you and Mr. Durrant?"

"Yes, sir."

During almost the entirety of the cross-examination of the child, defense counsel did exactly the thing that he complains of the Commonwealth's having done. There was never any question that the ongoing textual conversation resulting in the criminal charges was between the child and Durrant, as opposed to being between the child and some unknown person, as now argued on appeal. In fact, at one point the Commonwealth objected on authentication grounds, and defense counsel then questioned the child on the transcription of the spreadsheet, to

wit: "you recognize that conversation on January 6 between you and he, between Mr. Durrant and you?" "Yes, sir."

Following a jury trial, Durrant was convicted of fourteen counts of Use of a Minor in a Sexual Performance; one count of Possession of Matter Portraying a Sexual Performance by a Minor; and four counts of Unlawful Use of Electronic Means to Induce a Minor to Engage in Sexual or Other Prohibited Activities. He was acquitted on the remaining charges. Durrant was sentenced to ten years of imprisonment for each of his fourteen convictions for Use of a Minor in a Sexual Performance; one year of imprisonment for his Possession of Matter Portraying a Sexual Performance by a Minor conviction; and one year for each of his four convictions for Unlawful Use of Electronic Means to Induce a Minor to Engage in Sexual or Other Prohibited Activities. The court ordered his sentences to run concurrently, for a total sentence of ten years of imprisonment, which was ordered to run consecutively to any other sentence Durrant may have or receive from any other court proceeding. Durrant was further sentenced to a five-year period of post-incarceration supervision upon his release from incarceration or parole. He was also informed of his duty to register as a sex offender, and he was ordered to pay a $1,000.00 fine.

Durrant now appeals, contending that: (1) the trial court improperly allowed the prosecution to introduce a spreadsheet of text messages prepared by TextPlus; (2) the trial court should have granted a mistrial when the Commonwealth introduced prior bad acts evidence without notice to the defendant;

(3) the trial court should have instructed the jury on the lesser-included offenses of Unlawful Use of Electronic Means to Induce a Minor to Engage in Sexual or Other Prohibited Activities for counts one through fourteen; and (4) Durrant was denied his constitutional rights as a result of alleged cumulative error.

II. ANALYSIS

A. SPREADSHEET

Durrant alleges that the trial court improperly allowed the prosecution to introduce a spreadsheet of text messages[2] prepared by TextPlus. He contends that "[a]lthough the spreadsheet itself was not introduced into evidence, its contents were, through [the child] and the prosecutor reading portions of the spreadsheet into evidence." Upon a review of the trial in this matter, it is beyond evident that this argument is lacking in merit for the reasons stated below.

"The standard of review on evidentiary issues is abuse of discretion. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Burchett v. Commonwealth*, 314 S.W.3d 756, 758 (Ky. App. 2010) (internal quotation marks and citations omitted).

> "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in

[2] The spreadsheet or the text messages upon which it was based have not been included in the written record before us.

> question is what its proponent claims." KRE[3] 901(a). For purposes of authentication, the condition of fact which must be fulfilled by every offer of real proof is whether the evidence is what its proponent claims. Part of the identification of evidence is a demonstration of its integrity—that it is in fact what its proponent claims it to be.

Hunt v. Commonwealth, 304 S.W.3d 15, 39 (Ky. 2009), *as modified on denial of reh'g* (Ky. 2010) (citations omitted). "[T]he most widely used method of authentication is testimony by one with personal knowledge that a writing is what it is claimed to be." *Bell v. Commonwealth*, 875 S.W.2d 882, 886 (Ky. 1994) (quoting Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 7.05(I) (3d ed., 1993), KRE 901(b)(1)).

While we have not located a Kentucky published case on point, the case of *Simmons v. Commonwealth*, 2013 WL 674721, (Ky. Feb. 21, 2013)(2012-SC-000064-MR),[4] which the Commonwealth and trial court relied upon, involved text and Facebook messages. In *Simmons*, the Kentucky Supreme Court noted that the standard for authentication was whether "the matter in question is what the proponent claims it to be." 2013 WL 67421 at *2.[5] Regarding the Facebook messages, there was a question of authentication because they were introduced into

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[3] Kentucky Rules of Evidence.

[4] Citation to this unpublished opinion fits within the criteria of Kentucky Rules of Civil Procedure 76.28(4)(c).

[5] Regarding the text messages, we note that the Court held that because they were never admitted into evidence, there could be no violation of KRE 901, even though the witness was allowed to read from her handwritten diary reproducing the text messages. This is precisely what took place in the present case.

evidence. The Commonwealth, prior to trial, had introduced a printout of the Facebook messages created by the victim's father and from Facebook's corporate office, produced pursuant to a search warrant. The victim testified that the messages were in fact what they purported to be; the victim's father testified that he viewed the Facebook account and the messages on the printed pages were the messages he printed and turned over to authorities; and a detective testified that the Facebook printout was a result of a search warrant that he had obtained and sent to Facebook's corporate office.

In reviewing the issue, the Court noted that "a writing's content, taken in conjunction with the circumstances, can be relied upon in determining authentication. Ultimate responsibility for judging authenticity of documents, however, rests with the jury: The role of the judge, as a gatekeeper, is only to determine if an offering party has produced enough evidence for a reasonable jury to find authenticity." *Id*. (Citations omitted). The Court held that given the testimony presented in *Simmons*, the trial court did not abuse its discretion.[6]

Herein, there can be no question that the trial court did not abuse its discretion regarding the text messages and images at issue. While the child did not have independent recollection of the individual texts, she testified that the text messages presented in the spreadsheet were between her and Durrant. Detective Jones testified that he had viewed the messages and digital images on the child's

[6] This is in accord with what courts from other jurisdictions have held. *See, e.g., State of North Dakota v. Thompson*, 777 N.W.2d 617, 624 (N.D. 2010) (collecting cases).

phone. Detective Jones had taken photographs of the images on the child's phone, and those were introduced into evidence. He also testified that the spreadsheet was produced by TextPlus in response to a search warrant he executed. The spreadsheet, however, was not introduced into evidence. Thus, given that the facts in this case are very similar to those in *Simmons,* we conclude there was no abuse of discretion in the trial court's decision to allow testimony using the spreadsheet produced from TextPlus.

Having reviewed the trial in this matter, we pause to note that what is argued on appeal does not reflect what actually occurred at the trial. Throughout his appellate brief, Durrant alleges that no evidence beyond the spreadsheet was set forth that he in fact received and sent the texts reflected in the spreadsheet. To illustrate what is claimed on appeal versus what actually transpired at trial, we have set forth quotes from Durrant's brief and quotes from what actually transpired at the trial. In his brief, Durrant alleges, in part, that:

> At trial, the Commonwealth introduced evidence of text messages, allegedly between [the child] and Anthony Durrant, by leading her through a printout of the text messages prepared for trial by TextPlus, a text application service. No witnesses, lay or expert, confirmed that the spreadsheet was accurate, that Mr. Durrant received the messages, or that he sent the alleged responses. [The child] admitted she had no independent recollection of the text messages.*** The Commonwealth did not ask her to recall her text conversations. Rather, the prosecutor simply showed her the printout of the alleged text messages and asked her if she recognized it. [The child] then testified that it appeared to be 'a conversation I had with Mr. Durrant.' This pattern was followed repeatedly by the

Commonwealth for each set of text messages, which formed the basis for each count of the indictment. [Appellant Brief pp. 1-2].

There was no evidence that Mr. Durrant sent the text messages to [the child], other than [the child's] uncorroborated claim. Detective Brandon Jones testified that the information he received from TextPlus did not identify Mr. Durrant's phone as one of the phones in the text conversation. No other witness testified that Mr. Durrant sent the messages to [the child]. The Commonwealth did not introduce any evidence that the text messages came from Mr. Durrant's telephone or that Mr. Durrant admitted to sending the text messages. None of the text messages identified the sender as Mr. Durrant. The Commonwealth did not introduce Mr. Durrant's telephone into evidence, nor did it introduce records from Mr. Durrant's cell phone. The prosecution did not even ask [the child] how she knew the texts were from Mr. Durrant. [Appellant Brief p. 2].

As for Mr. Durant's [sic] alleged statements contained in the TextPlus spreadsheet, there was no evidence to verify that these statements on the spreadsheet were from Anthony Durrant. Neither [the child] nor the Commonwealth ever established that the text messages came from Anthony Durrant. None of the texts identify Mr. Durrant as a recipient or sender. None of the texts contain identifying information to establish that Mr. Durrant was a party to the conversations. [The child] may have been able to authenticate her own messages that she sent, but she cannot authenticate texts from another person. [Appellant Brief pp. 9-10].

The prejudice of this error to Mr. Durrant is overwhelming. The text messages formed the entirety of the evidence against Mr. Durrant for all of his convictions. [The child] did not testify from her memory as to a single text message or photograph sent between her and Mr. Durrant. Without the TextPlus spreadsheet read into evidence, there was insufficient evidence to convict Mr. Durrant of even a single offense. [Appellant Brief p. 10].

Contrary to the above statements and despite Durrant's objections to the TextPlus spreadsheet, there was never any dispute at trial that it was in fact Durrant who received and sent messages to the child. Rather, the question Durrant raised during trial was whether this was *criminal, not whether Durrant was the one who received and sent the text messages*. He cannot make one argument to the trial court and then a totally different argument to this Court.

To illustrate this point, we turn to defense counsel's opening statement during the trial:

> [The child] started texting him, and the record is going to show that she texted him for four to five weeks before he would ever respond. He might say "hello, how are you." That was it and the record will show that then she started sending pictures to him. He started… he started… He didn't know what to do, ok. He didn't request any of the pictures. You are going to see pictures that disgust you; they disgust me. But that's why I asked you during voir dire "are girls more forward today?" There's a lot of suggestions. You are going to see and hear a lot of inappropriate stuff. **We are not disputing that. The question is "is it criminal**?" We think there's not going to be enough evidence for you to find that it is. We talked about the use of a minor in a sexual performance. She sent the pictures to him; he never requested them. You know when he started getting these things, he thought "I can handle this myself. I don't want to get this girl in trouble." Then, the next thing he knows, he's in over his head, and he's in a conundrum. He doesn't know what to do. I can think of a lot of things. You know I think about the old "if'ing" game. If only I had done this one day or if only I had done that. Well, that's easy to say in this situation. At the time he didn't know what to do. So you're going to see a lot of smoke but you're not going to see any fire. And that's what the evidence is going to show. You're not going to hear any

> evidence that he in any way consented to her sending these pictures; that he authorized her sending these pictures; that he induced her to send these pictures. None. I don't know what the evidence will show from the other side completely but I think it will show when he got them, he deleted them. So he is in a conundrum; he doesn't know what to do…. Mr. Durrant got caught up in this web; he didn't know how to handle it. He thought he could keep this girl from getting into trouble….

(Emphasis added).

Certainly, defense counsel's opening statement is not evidence. It is quoted for the point that it was essentially conceded from the beginning that Durrant was the other person at the end of the text conversation at issue, contrary to the argument made on appeal.

Moreover, beyond the opening statement, Durrant's counsel specifically and repeatedly asked the child about the messages between her and *Durrant, by name.* For example at the beginning of cross-examination, defense counsel questioned the child about the *first message she received from Durrant*, wishing her a happy new year on January 3, 2013. Then, throughout his cross-examination, defense counsel employed a method of questioning the child that put Durrant at the other end of the text messages. We illustrate this as reflected in the following quotes:

> Defense counsel: "Your brother went through your app, is that right"
> Child: "Yes … sir"
> Defense counsel: "And, when he went through your app, that's when he saw these texts that you had sent to Mr. Durrant, is that right?
> Child: "Yes sir."

….
Defense counsel: "Do you recognize this conversation on January 3?"
Child: "Yes, sir?"
Defense counsel: "This is what you said, and this is what Mr. Durrant said?"
Child: "Yes, sir?"
….
Defense counsel: "On January 4th, do you recognize that conversation between you and Mr. Durrant?"
Child: "Yes, sir."

Defense counsel repeatedly referred to the text messages between the child and Durrant, and defense counsel repeatedly–and exclusively—referred to the ongoing text conversation as one between the child and *Durrant*, *by name*.

We also note that although counsel for Durrant voiced objections regarding authentication of the TextPlus spreadsheet, defense counsel employed the same tactics as the Commonwealth in questioning the child—a transcription of the text messages was used by the defense. Accordingly, during almost the entirety of the cross-examination of the child, defense counsel did exactly the thing that Durrant complains of the Commonwealth's having done. Counsel went through the transcription of the TextPlus spreadsheet nearly line-by-line, where he thought the texts were more favorable to his client. There was never any question that the ongoing textual conversation resulting in the criminal charges was a conversation between the child and Durrant, as opposed to being between the child and some unknown person as Durrant now argues on appeal.

We also note that the present argument on authentication is even more remarkable when considering the fact that at one point the Commonwealth objected on authentication grounds during defense counsel's cross-examination of the child. To which, defense counsel responds by questioning the child on the transcription of the spreadsheet to wit: "You recognize that conversation on January 6 between you and he, between Mr. Durrant and you?" The child responded: "Yes, sir."

Given the strategy employed by defense counsel, there can be no serious question that the text messages were between the child and Durrant, or that the spreadsheet was what it purported to be: a series of ongoing text messages between the child and Durrant. The trial court properly allowed the child to be questioned using the spreadsheet. And, even if this could be construed as an abuse of discretion, Durrant clearly waived any error. Consequently, we affirm on this issue.

B. PRIOR BAD ACTS EVIDENCE

Next, Durrant asserts that the trial court should have granted a mistrial when the Commonwealth introduced prior bad acts evidence without notice to Durrant. The child testified that she and Durrant got close at a basketball game. She alleged that Durrant "tried to have sex with" her. She explained this allegation by stating that when she opened the door to get into Durrant's car, he showed her a condom, which she described as being in a small rectangular package. The child

stated that Durrant "tried to touch" her, but he did not actually touch her because she got out of the car. Defense counsel objected because Durrant had not been charged with trying to touch the child and the defense had not been informed of this allegation prior to trial. Defense counsel argued that this was inadmissible prior bad act evidence and moved for a mistrial, or, in the alternative, to strike the child's testimony. The trial court denied the motions for a mistrial and to strike, but ultimately admonished the jury not to consider the statement that Durrant had "tried to touch" the child because there was no charge in the indictment for this allegation on that date.

We review the denial of a motion for a mistrial for an abuse of discretion. *See Bray v. Commonwealth*, 68 S.W.3d 375, 383 (Ky. 2002). "A mistrial is appropriate only where the record reveals a manifest necessity for such an action or an urgent or real necessity." *Id.* (internal quotation marks and citation omitted).

There is no necessity for declaring a mistrial when the evidentiary error at issue may be "cured by an admonition to the jury to disregard the testimony." *Graves v. Commonwealth*, 17 S.W.3d 858, 865 (Ky. 2000). "A jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error." *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003).

> There are only two circumstances in which the presumptive efficacy of an admonition falters: (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition *and* there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant, or (2)

> when the question was asked without a factual basis *and* was "inflammatory" or "highly prejudicial."

Id. (citations omitted).

Durrant has not shown that there was an overwhelming probability the jury would be unable to follow the court's admonition and that there was a strong likelihood the effect of the inadmissible evidence would be devastating to him. Additionally, Durrant has not shown that the question asked was without a factual basis and was "inflammatory" or "highly prejudicial"— the child had just testified about a text that referred to the last time that she and Durrant "got close," and the prosecutor merely asked what that meant and told the child to "tell me about it." Therefore, the presumptive efficacy of the admonition does not falter, and we assume that the jury followed the admonition to disregard the evidence. Consequently, this claim lacks merit.

C. LESSER-INCLUDED OFFENSES

Durrant next contends that the trial court should have instructed the jury on the lesser-included offense of Unlawful Use of Electronic Means to Induce a Minor to Engage in Sexual or Other Prohibited Activities for counts one through fourteen. In counts one through fourteen, Durrant was charged with and convicted of fourteen counts of Use of a Minor in a Sexual Performance.

Pursuant to KRS[7] 510.155, the Unlawful Use of Electronic Means to Induce a Minor to Engage in Sexual or Other Prohibited Activities includes the following:

[7] Kentucky Revised Statutes.

> (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 Chapter 531.
>
> (2) No person shall be convicted of this offense and an offense specified in KRS 506.010, 506.030, 506.040, or 506.080 for a single course of conduct intended to consummate in the commission of the same offense with the same minor or peace officer.
>
> (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, and the offense is complete at that point without regard to whether the person met or attempted to meet the minor.
>
> (4) This section shall apply to electronic communications originating within or received within the Commonwealth.
>
> (5) A violation of this section is punishable as a Class D felony.

As for the Use of a Minor in a Sexual Performance, KRS 531.310 defines that crime as follows:

> (1) 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.
>
> (2) Use of a minor in a sexual performance is:
>
> > (a) A Class C felony if the minor so used is less than eighteen (18) years old at the time the minor engages in the prohibited activity;

> (b) A Class B felony if the minor so used is less than sixteen (16) years old at the time the minor engages in the prohibited activity; and
>
> (c) A Class A felony if the minor so used incurs physical injury thereby.

Durrant contends that Unlawful Use of Electronic Means to Induce a Minor to Engage in Sexual or Other Prohibited Activities is a lesser-included offense of Use of a Minor in a Sexual Performance and that the jury should have been instructed on the lesser-included offense in addition to the charged offense.

> A defendant is entitled to an instruction on any lawful defense which he has. Although a lesser included offense is not a defense within the technical meaning of those terms as used in the penal code, it is, in fact and principle, a defense against the higher charge. . . . KRS 505.020(2) establishes whether a charge is a lesser-included offense. Under KRS 505.020(2), "[a] defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so included when: (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged. . . ."

Hudson v. Commonwealth, 202 S.W.3d 17, 20 (Ky. 2006) (internal quotation marks omitted and emphasis removed). "[I]f the lesser offense requires proof of a fact not required to prove the greater offense, then the lesser offense is not included in the greater offense, but is simply a separate, uncharged offense." *Id*. at 20-21 (internal quotation marks and citation omitted).

In the present case, the offense of Unlawful Use of Electronic Means to Induce a Minor to Engage in Sexual or Other Prohibited Activities cannot be a lesser-included offense of Use of a Minor in a Sexual Performance because it

requires proof of a fact, *i.e.*, the use of electronic means, that is not required to prove the "greater offense" of Use of a Minor in a Sexual Performance. Consequently, this claim lacks merit.

D. CUMULATIVE ERROR

Finally, Durrant alleges that he was denied his constitutional rights as a result of cumulative error. However, because we have determined that none of the individual claims of error had merit, there can be no cumulative error. *See Epperson v. Commonwealth*, 197 S.W.3d 46, 66 (Ky. 2006). Consequently, this claim lacks merit.

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

ALL CONCUR.

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