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Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000238-MR

JAMES LEROY CAYTON

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 17-CR-00006

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON, GOODWINE, AND MAZE, JUDGES.

MAZE, JUDGE: KRS¹ 510.155(1) makes it unlawful for “any person to knowingly use a communications system . . . 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 sexual or prohibited activities. A

¹ Kentucky Revised Statutes.

Franklin County jury found Appellant, James LeRoy Cayton, guilty under this statute for sending emails and text messages to a peace officer posing as an adult female offering to arrange for a sexual encounter between Cayton and her thirteen-year-old daughter. Cayton contends a finding of a guilt is permissible under KRS 510.155 only if the defendant believes he is communicating with a minor. For reasons stated below, we hold that a person can be found guilty under KRS 510.155 by communicating through an adult intermediary. We therefore affirm Cayton's conviction.

I. Background and Procedural History

Cayton posted an ad on the website Craigslist seeking a partner for "Taboo Role-Playing Fun." Cayton's ad expressed an explicit interest in incest role-playing. Cayton received a response from "Vanessa," purportedly a divorced adult woman with a thirteen-year-old daughter. Cayton and Vanessa then began conversing through texts and email, with Cayton expressing an explicit interest in having sex with both Vanessa and her daughter. Cayton also asked Vanessa to speak to her daughter about the potential sexual encounter. The following exchange through text messages is illustrative:

Cayton: How'd the talk [with the daughter] go?

Vanessa: Ok

Cayton: Well lol [laugh out loud]. What she say and what u tell her or talk to her about lol?

Vanessa: Just asked if she wants to meet a friend for lunch next week and that she can't say anything to my bf [boyfriend] about it because he would not understand

Cayton: Oh ok. Talk to her about sex at all?

Vanessa: Just that an older person has more experience

Cayton: What she say?

Vanessa: She said she was curious about it

Cayton: Did u tell u want to help her experience it or that your friend would?

Vanessa: I just thought we would talk about it at lunch and see what happens

Cayton: Oh ok. Was hoping we could all meet at a private place and go from there. Maybe u play with me while She [sic] watches and then joins

Cayton also repeatedly requested Vanessa send nude photographs of her daughter to "see how serious" they were about the proposed sexual encounter. Vanessa refused, and communications ceased.

Vanessa was actually Matt Hedden, an undercover agent with the Kentucky Attorney General's Office conducting a sting operation. Based on Hedden's evidence, Cayton was indicted and tried before a Franklin County jury on one count of unlawful use of electronic means to induce a minor to engage in sexual or other prohibited activities. Hedden testified for the Commonwealth about his communications with Cayton while posing as Vanessa. Cayton testified

at trial that he believed he was communicating with an adult who was merely playing along with his incest fantasy.

Cayton tendered a proposed jury instruction that permitted the jury to find him guilty of use of electronic means to induce a minor to engage in sexual or other prohibited activities only if the victim was a police officer whom he believed to be a person less than sixteen years old. The Commonwealth tendered, and the trial court adopted, the following jury instruction:

You will find the Defendant, James Leroy Cayton, guilty of Unlawful Use of Electronic Means to Induce a Minor to Engage in Sexual or Other Prohibited Activities, under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

- A. That between on or about the 22nd day of March, 2016, and on or about the 4th day of April, 2016, and before the finding or return of the Indictment herein, the defendant, James Leroy Cayton, II, knowingly used a computer, computer network or cellular telephone to communicate for the purpose of procuring or promoting the use of a person under the age of sixteen (16) years for the purpose of illegal sexual activity;
- B. That the communication transmitted by such electronic means originated from or were received in Franklin County, Kentucky;
- C. That at the time of the communication the person with whom the defendant communicated was a law enforcement officer who the defendant believed to be *either* the mother of a female less than sixteen (16) years of age who would assist in the Defendant's procuring or promoting the use of her daughter for illegal sexual activity, *or* was a person less than sixteen (16) years of

age who the defendant sought to procure for purposes of illegal sexual activity.

(Emphasis added.) Cayton was found guilty and sentenced to two years' imprisonment. Cayton argues this instruction misstated the law and violated his right to a unanimous verdict because it permitted the jury to find guilt even if he never communicated with someone he believed to be a minor.

II. Standard of Review

Alleged errors in jury instructions are questions of law; therefore, our review is *de novo*. *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006).

III. Analysis

Jury instructions must “properly and intelligibly state the law.” *Howard v. Commonwealth*, 618 S.W.2d 177, 178 (Ky. 1981) (citing *Simpson v. Commonwealth of Kentucky*, 313 Ky. 559, 233 S.W.2d 118, 120 (1950)). Under KRS 510.155(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 510.040, 510.050, 510.060, 510.070, 510.090, 510.110, 529.100

where that offense involves commercial sexual activity, or 530.064(1)(a), or KRS Chapter 531.

(Emphasis added.) Contrary to Cayton’s argument, KRS 510.155(1) is not limited to communications sent to minors or peace officers posing as minors. The statute makes unlawful any use of a communications system for the “purpose of procuring or promoting” a minor for sexual or other prohibited activities. “Promote” is defined as “to prepare, publish, print, procure or manufacture, or to offer or agree to do the same.” KRS 531.300(7). Although the Kentucky Revised Statutes do not define the term “procure,” BLACK’S LAW DICTIONARY (10th ed. 2014) provides the following definition: “1. To obtain (something), esp. by special effort or means. 2. To achieve or bring about (a result). 3. To obtain a sexual partner for another, esp. an unlawful partner such as a minor or a prostitute.”

The Commonwealth introduced evidence that Cayton’s texts to Vanessa were intended to cause a minor to assent to sexual activity and to arrange a time and place for that sexual encounter. In other words, he intentionally used electronic means for the purpose of preparing, agreeing, and bringing about sexual activity with someone he believed to be under the age of sixteen. An appellate court has a “duty to accord to words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion.” *Bailey v. Reeves*, 662 S.W.2d 832, 834 (Ky. 1984). “General principles of statutory construction

hold that a court must not be guided by a single sentence of a statute but must look to the provisions of the whole statute and its object and policy.” *County of Harlan v. Appalachian Regional Healthcare, Inc.*, 85 S.W.3d 607, 611 (Ky. 2002). This Court has already held, albeit in a different context, that the identity of the person receiving the communication is not the dispositive issue under KRS 510.155(1). *Filzek v. Commonwealth*, 309 S.W.3d 790, 791 (Ky. App. 2009). It is whether the defendant believed he was soliciting an actual child for sexual activities. *Id.* A finding of guilt for communicating with an adult intermediary for the purpose of bringing about an illegal sexual encounter with a minor is consistent with both the literal meaning of the words in KRS 510.155(1) and the statute’s object and policy.

Cayton’s appeal relies on the statute’s explicit reference to a “a peace officer posing as a minor[.]” Under his reasoning, communications with any other adult intermediary is outside the scope of KRS 510.155(1), regardless of the intent behind those communications. The Missouri Court of Appeals and the Florida Court of Appeals have rejected this exact argument while interpreting analogous statutes. *State v. Wilson*, 128 So. 3d 946, 948-49 (Fla. Dist. Ct. App. 2013); *State v. Craig*, 498 S.W.3d 459, 465 (Mo. Ct. App. 2016). For example, the Child Enticement Statute at issue in *Craig*, 498 S.W.3d at 464-65, provided that:

1. A person at least twenty-one years of age or older commits the crime of enticement of a child if that person persuades, solicits, coaxes, entices, or lures whether by words, actions or through communication via the Internet

or any electronic communication, any person who is less than fifteen years of age for the purpose of engaging in sexual conduct.

2. It is not an affirmative defense to a prosecution for a violation of this section that the other person was a peace officer masquerading as a minor.

The Appellant was convicted after sending text messages to an undercover officer posing as a mother offering her thirteen-year-old daughter for sex. *Id.* at 461. The Court held that the Appellant's conduct was clearly prohibited under subsection 1. *Id.* at 465. Accordingly, the explicit reference to peace officer in subsection 2 did not create an affirmative defense for communications with any other adult intermediary. *Id.* at 465 n.4. The Court concluded any other interpretation would "eviscerate" the statute's effectiveness. *Id.* at 467. The same reasoning is applicable to KRS 510.155(1), which has similar wording and purpose.

Thus, we hold that direct communication with a minor or a police officer posing as a minor is not necessary for a conviction under KRS 510.155(1). A person is guilty under the statute when he or she uses electronic means to communicate with either a minor or an adult intermediary for the purposes of engaging in any activity in violation of KRS 510.040, 510.050, 510.060, 510.070, 510.080, 510.090, 510.110, 529.100 where that offense involves commercial sexual activity, or 530.064(1)(a), or KRS Chapter 531. Because the trial court's

instructions properly and intelligibly stated the law, Cayton was not denied a unanimous verdict.

Finally, we note that the majority of jurisdictions to have addressed the issue have found that a person can be guilty of enticing or soliciting a minor for sex by communicating with an adult intermediary. *See, e.g., United States v. Roman*, 795 F.3d 511, 516 (6th Cir. 2015); *State v. Cosmo*, 757 S.E.2d 819, 821 (Ga. 2014). *But see People v. Douglas*, 296 P.3d 234, 241 (Colo. App. 2012). Although most of these jurisdictions have statutes expressly criminalizing attempted solicitation or enticement of children, Kentucky’s explicit prohibition on “procuring or promoting” compels a similar result in this case. *See Pavlovich v. State*, 6 N.E.3d 969, 982 (Ind. Ct. App. 2014) (affirming conviction for communications with a police detective posing as a prostitute offering her nine-year-old sister for sex even though Indiana’s child solicitation statute did not expressly prohibit “attempt”).

IV. Conclusion

The judgment and sentence of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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