Missouri Court of Appeals

Southern District

Division Two

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SD35293
	)	Filed: December 17, 2018
DUANE MICHAUD,	)	
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY

Honorable Thomas E. Mountjoy, Circuit Judge

REVERSED AND REMANDED

Duane Michaud ("Michaud") was convicted, after a jury trial, of the unclassified felony of attempted enticement of a child, pursuant to section 566.151.[1] The trial court sentenced Michaud to five years' imprisonment. Finding merit to Michaud's first point, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

[1] All references to section 566.151 are to RSMo Cum.Supp. 2006.

Facts and Procedural History

Michaud was charged by information with the unclassified felony of attempted enticement of a child, pursuant to section 566.151. The charging document recited that:

> on [or] between June 20, 2012 and August 10, 2012, . . . [Michaud] was twenty-one years of age or older, laid down next to [Victim] on a bed and started rubbing [Victim]'s lower stomach and such conduct was a substantial step toward the commission of the crime of enticement of a child by attempting to persuade a person less than fifteen years of age to engage in sexual conduct, and was done with the purpose of committing such enticement of a child.

A jury trial commenced on August 14, 2017. Michaud did not testify.

The State's verdict directing instruction was submitted to the jury over defense counsel's objection as Instruction No. 5.[2] The instruction read:

> INSTRUCTION NO. 5
>
> If you find and believe from the evidence beyond a reasonable doubt:
>
> First, that between June 20, 2012 and August 10, 2012, in the County of Greene, State of Missouri, the defendant, while laying down on a bed next to [Victim], started rubbing the lower stomach of [Victim], and
>
> Second, that such conduct was a substantial step toward the commission of the offense of enticement of a child by attempting to persuade a person less than fifteen years of age to engage in sexual conduct, and
>
> Third, that defendant engaged in such conduct for the purpose of committing such enticement of a child, and

[2] The record reflects that the State and defense counsel both submitted instructions explicitly referencing MAI-CR3d. Michaud's trial took place on August 14, 2017, so that the applicable version was MAI-CR4th. *See* MAI "***HOW TO USE THIS BOOK***," at iii (4th ed. 2017) ("The instructions in this book must be used for all trials occurring on or after January 1, 2017, provided that the instruction reflects the substantive law concerning the offense."). As relevant to this appeal, MAI-CR4th 420.60 and 420.62 track MAI-CR3d 320.37.1 and 320.37.2 without substantive change. Elsewhere in this opinion, we curatively refer to MAI-CR4th, for the reason that error in this context is tested against what should have been done, and not merely what the parties or trial court *supposed* should be done at the time.

Fourth, that the defendant was twenty-one years of age or older, then you will find the defendant guilty of attempted enticement of a child.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

A person commits the crime of enticement of a child if he is a person at least twenty one years of age or older and he persuades, solicits, coaxes, entices, or lures a person less than fifteen years of age for the purpose of engaging in sexual conduct with the defendant.

As used in this instruction, the term "substantial step" means conduct that is strongly corroborative of the firmness of the defendant's purpose to complete the commission of the offense of enticement of a child.

As used in this instruction, "sexual conduct" means sexual intercourse, deviate sexual intercourse or sexual contact.

As used in this instruction, "sexual intercourse" means any penetration, however slight, of the female sex organ by the male sex organ, whether or not an emission results.

As used in this instruction, the term "deviate sexual intercourse" means any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person.

As used in this instruction, "sexual contact" means any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person.

As used in this instruction, a person acts purposely, or with purpose, with respect to the person's conduct or to a result thereof when it is his or her conscious object to engage in that conduct or to cause that result.

Defense counsel objected to Instruction No. 5 and proffered the following non-MAI-CR alternative verdict directing instruction that combined the MAI-CR approved instructions for enticement of a child and attempted enticement of a child:

INSTRUCTION NO. A

If you find and believe from the evidence beyond a reasonable doubt:

First, that between June 20, 2012 and August 10, 2012, in the County of Greene, State of Missouri, the defendant, while laying down on a bed next to [Victim], started rubbing the lower stomach of [Victim], and

Second that such conduct was a substantial step toward the commission of the offense of enticement of a child by attempting to persuade a person less than fifteen years of age to engage in sexual conduct, and

Third, that defendant engaged in such conduct for the purpose of committing such enticement of a child, and

Fourth, that the defendant knew that [Victim] was less than fifteen years of age, and

Fifth, that the defendant was twenty-one years of age or older,

then you will find the defendant guilty of attempted enticement of a child.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

A person commits the crime of enticement of a child if he is a person at least twenty one years of age or older and he persuades, solicits, coaxes, entices, or lures a person less than fifteen years of age for the purpose of engaging in sexual conduct with the defendant.

A person acts purposely, or with purpose, with respect to the person's conduct or to a result thereof when it is his or her conscious object to engage in that conduct or to cause that result.

The instruction went on to define the terms "substantial step," "sexual conduct," "sexual intercourse," "deviate sexual intercourse," and "sexual contact."

The jury found Michaud guilty of "attempted enticement of a child, as submitted in Instruction No. 5[,]" and assessed punishment of imprisonment for a term of five years.

The trial court then sentenced Michaud to five years in the Department of Corrections, concurrent with any other existing sentence, with probation denied.

On September 10, 2017, Michaud filed a motion for new trial asserting, in relevant part, that the trial court erred in overruling Michaud's objections to Instruction No. 5, and in denying Michaud's request to submit verdict directing Instruction A, in that Instruction No. 5 omitted the knowledge-of-age element of the offense.

On December 8, 2017, after a hearing, the trial court overruled Michaud's motion. This appeal followed.

As relevant to our disposition, Michaud argues the trial court erred in denying his request to submit his alternative verdict directing Instruction A that required the jury to find that he knew Victim was less than 15 years old.[3]

Standard of Review

> On claims of instructional error, an appellate court will reverse only if there is error in submitting an instruction and prejudice to the defendant. MAI instructions are presumptively valid and, when applicable, must be given to the exclusion of other instructions.

State v. Doubenmier, 444 S.W.3d 921, 929 (Mo.App. S.D. 2014) (internal quotation and citation omitted). However, as our Supreme Court has indicated: "[t]o the extent MAI–CR and its notes on use conflict with this substantive law, they are not binding. Procedural rules adopted by MAI cannot change the substantive law and must therefore be interpreted in the light of existing statutory and case law." ***State v. Celis-Garcia***, 344 S.W.3d 150, 158 (Mo. banc 2011) (internal quotations and citations omitted).

[3] Michaud's first point is dispositive, and we need not address his second and third points.

Analysis

Michaud's Objections to Instruction No. 5, and Michaud's Verdict Directing Instruction A

Michaud argues that the trial court erred in rejecting his verdict directing Instruction A as to Michaud's charge for attempted enticement of a child. As applicable here, that rejected instruction posited that Michaud must know the age of Victim—*i.e.*, that Michaud knew (or believed) Victim was under the age of fifteen. Michaud suggests that the trial court's rejection of this instruction (and acceptance of the State's instruction not reflecting this distinction) resulted in the jury being improperly instructed to his prejudice. We agree.

At the time of Michaud's offense, the statutory elements of enticement of a child were delineated as follows:

> 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.

§ 566.151.1.

Every Missouri appellate court that touched this issue has expressed the same conclusion: section 566.151 requires the State to prove defendant's ***knowledge***, ***awareness***, or ***belief*** that Victim was less than fifteen years of age. *See*, *e.g.*, ***State v. Faruqi***, 344 S.W.3d 193, 202–03 (Mo. banc 2011) (Defendant's "***belief*** that he was communicating with a person under the age of 15 years for the purpose of sex was sufficient for criminal liability to attach[.]") (emphasis added); ***State v. Davies***, 330 S.W.3d 775, 787 (Mo.App. W.D. 2010) ("To convict [defendant] of attempted enticement of a child, the State had to prove beyond a reasonable doubt that . . . he communicated with someone ***he believed*** to be under the age of fifteen years old[.]") (emphasis added); ***State v. Fleis***, 319

S.W.3d 504, 507 (Mo.App. E.D. 2010) (State must prove that defendant "actually ***believed*** that the child involved was under the age of fifteen.") (emphasis added); ***State v. Osborn***, 318 S.W.3d 703, 713-15 (Mo.App. S.D. 2010) (reversing defendant's conviction for enticement of a child[4] because the State failed to adduce sufficient evidence that defendant "***knew*** [Victim] was under fifteen years of age.") (emphasis added).[5]

Michaud's position seems to derive from MAI-CR4th 420.60 ("**ENTICEMENT OF A CHILD**"),[6] which reflects the fact that the State must prove defendant knew or

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[4] Missouri's "attempt statute requires only a showing that defendant's purpose was to commit the underlying offense and that defendant took a substantial step toward its commission." ***Faruqi,*** 344 S.W.3d at 202 (internal quotation and citation omitted). Thus, an attempt to commit an underlying offense necessarily presumes a corresponding *mens rea*.

[5] The State's brief attempts to distinguish ***Fleis*** and ***Osborne***, suggesting that because "the State in those cases did not challenge the propriety of those instructions," those cases lack precedential value. This premise is incorrect. "[P]arty admissions, concessions, or omissions as to matters of *law* have no effect as to an appellate court's duty to independently resolve such matters of *law*, nor on the precedential effect of an appellate court's resolution thereof." ***Four Seasons Racquet & Country Club Prop. Owners Ass'n, Inc. v. Butler***, 539 S.W.3d 122, 130 n.14 (Mo.App. S.D. 2018) (emphasis in original); *see* ***State v. Clark***, 490 S.W.3d 704, 716 n.4 (Mo. banc 2016) (Wilson, J., concurring); ***State v. Hardin***, 429 S.W.3d 417, 421 n.4 (Mo. banc 2014); ***State v. Biddle***, 599 S.W.2d 182, 186 n.4 (Mo. banc 1980). The cases cited in the body of this opinion "applied the law to the facts in . . . published decision[s], and thus *stare decisis* must take the day." ***Four Seasons***, 539 S.W.3d at 130 n.14.

The State also invites this Court to delve into statutory interpretation, to disregard ***Fleis*** and ***Osborne*** as wrongly decided, and to apply the State's interpretation as the legislature's intent. This line of argument has the potential to bear fruit in certain forums at certain points in time. In the present forum, at the present time, it has none. Our Supreme Court (along with all three districts of this Court) have issued opinions inconsistent with the State's new interpretation. "[A]ppeals that lie initially with the court of appeals are lodged there with the understanding that the court of appeals is an error-correcting court. Such cases can be transferred to [the Supreme Court] because [it] is a law-declaring court." ***State v. Freeman***, 269 S.W.3d 422, 429 (Mo. banc 2008) (Wolff, J., concurring) (internal quotation and citation omitted). We lack authority to proceed as the State requests, and decline its vociferous invitations to do so.

[6] MAI-CR4th 420.60 ("**ENTICEMENT OF A CHILD**") states:

> (As to Count _____, if) (If) you find and believe from the evidence beyond a reasonable doubt:
>
> First, that (on) (on or about) [*date*], in the State of Missouri, the defendant (persuaded) (solicited) (coaxed) (enticed) (lured) [*Identify victim.*] by [*Describe the words or actions of the defendant, such as "suggesting in an e-mail that they go to a motel room."*], and
>
> Second, that the defendant did so for the purpose of engaging in sexual conduct with [*Identify victim.*], and

believed that Victim was under the age of fifteen, while MAI-CR4th 420.62 ("**ATTEMPTED ENTICEMENT OF A CHILD**")[7] does not include that *mens rea*

Third, that at that time, [*Identify victim.*] was less than fifteen years of age, and

Fourth, that [*Insert one of the following. Omit brackets and number.*]

[1] the defendant (knew) (or) (was aware) that [*Identify victim.*] was less than fifteen years of age,

[2] it was the defendant's purpose to have sexual conduct with a person less than fifteen years of age, and

Fifth, that the defendant was twenty-one years of age or older,

then you will find the defendant guilty (under Count _____) of enticement of a child.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

As used in this instruction, "sexual conduct" means sexual intercourse, deviate sexual intercourse or sexual contact.

As used in this instruction, "sexual intercourse" means any penetration, however slight, of the female sex organ by the male sex organ, whether or not an emission results.

As used in this instruction, the term "deviate sexual intercourse" means (any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person) (or) (a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object) done for the purpose of (arousing or gratifying the sexual desire of any person) (terrorizing [*Identify victim.*]).

As used in this instruction, "sexual contact" means any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person.

[7] MAI-CR4th 420.62 ("**ATTEMPTED ENTICEMENT OF A CHILD**") states:

(As to Count _____, if) (If) you find and believe from the evidence beyond a reasonable doubt:

First, that (on) (on or about) [*date*], in the State of Missouri, the defendant [*Describe the words or actions of the defendant, such as "suggesting in an e-mail that a child less than fifteen years of age go to a motel room with defendant." Do not use the word "attempt."*], and

Second, that such conduct was a substantial step toward the commission of the offense of enticement of a child by attempting to (persuade) (solicit) (coax) (entice) (lure) a person less than fifteen years of age to engage in sexual conduct, and

element. The State's accepted instruction followed MAI-CR4th 420.62, while Michaud's rejected instruction followed MAI-CR4th 420.60.

"MAI instructions are presumptively valid and, when applicable, must be given to the exclusion of other instructions." ***State v. Forrest***, 183 S.W.3d 218, 229 (Mo. banc 2006) (internal footnote omitted); Rule 28.02(c). "To the extent MAI–CR and its notes on

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> Third, that defendant engaged in such conduct for the purpose of committing such enticement of a child, and
>
> Fourth, that the defendant was twenty-one years of age or older, then you will find the defendant guilty (under Count _____) of attempted enticement of a child.
>
> However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.
>
> A defendant commits the offense of enticement of a child if the defendant is at least twenty-one years of age or older and the defendant persuades, solicits, coaxes, entices, or lures a person less than fifteen years of age for the purpose of engaging in sexual conduct with the defendant.
>
> As used in this instruction, the term "substantial step" means conduct that is strongly corroborative of the firmness of the defendant's purpose to complete the commission of the offense of enticement of a child. (It is no defense that it was factually or legally impossible to commit enticement of a child if such offense could have been committed had the circumstances been as the defendant believed them to be.)
>
> As used in this instruction, "sexual conduct" means sexual intercourse, deviate sexual intercourse or sexual contact.
>
> As used in this instruction, "sexual intercourse" means any penetration, however slight, of the female sex organ by the male sex organ, whether or not an emission results.
>
> As used in this instruction, the term "deviate sexual intercourse" means (any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person) (or) (a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object) done for the purpose of (arousing or gratifying the sexual desire of any person) (terrorizing [*Identify victim.*]).
>
> As used in this instruction, "sexual contact" means any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person or such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person.

use conflict with . . . substantive law, they are not binding." ***Celis-Garcia***, 344 S.W.3d at 158. "If an instruction following MAI–CR[] conflicts with the substantive law, any court should decline to follow MAI-CR[] or its Notes on Use." ***State v. Carson,*** 941 S.W.2d 518, 520 (Mo. banc 1997). Here, Instruction No. 5, MAI-CR 420.62 ("**ATTEMPTED ENTICEMENT OF A CHILD**"), conflicted with substantive law because it does not include the required *mens rea* element that defendant knew or believed Victim to be under the age of fifteen. Michaud's rejected instruction reflected substantive law. The State's instruction deviated from substantive law by omitting the required element of Michaud's knowledge of Victim's age. The trial court erred in overruling Michaud's objections to Instruction No. 5 and in rejecting Michaud's verdict directing Instruction A, while accepting the State's instruction. This error was prejudicial because the jury convicted Michaud without being asked to find an element necessary for Michaud's conviction, pursuant to section 566.151—*i.e.*, Michaud's ***knowledge***, ***awareness***, or ***belief*** that Victim was under the age of fifteen.

For the reasons set out in this opinion, Michaud's first point is granted. The trial court's judgment is reversed and remanded for further proceedings consistent with this opinion.

WILLIAM W. FRANCIS, JR., P.J. - OPINION AUTHOR

DANIEL E. SCOTT, J. – DISSENTS IN SEPARATE OPINION

MARY W. SHEFFIELD, J. – CONCURS

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DISSENTING OPINION

This case points up an unexpected and unexplained MAI split in requiring "underage" scienter to convict for child enticement, but not for an attempt to commit the same crime. For child enticement:

> Paragraph Fourth [of MAI-CR4th 420.60] sets out two options for submitting the defendant's culpable mental state regarding the age of the victim: either that defendant knew that the victim was less than fifteen years of age or that defendant acted with the purpose of having sexual conduct with a person less than that age. The choice of which option to submit should be left to the state.

MAI-CR4th 420.60, Note on Use 4. This tracks prior MAI-CR3d 320.37.1 and its Note on Use 5, even after two appellate districts noted there was no express statutory authority for this element. *See* ***State v. Fleis***, 319 S.W.3d 504, 507 n.2 (Mo.App. 2010); ***State v. Osborn***, 318 S.W.3d 703, 713-14 (Mo.App. 2010).

By contrast, past and present MAIs and notes on use for attempted child enticement omit this element. *See* MAI-CR4th 420.62, MAI-CR3d 320.37.2, and their respective notes on use.

I cannot reconcile this difference. If one MAI is wrong, it should be fixed. If, somehow, both are correct, an explanation in notes on use would be helpful.

Turning now to this case, I respectfully dissent. I am not convinced that RSMo § 566.151 child enticement demands underage scienter, notwithstanding the approved child-enticement MAI, its notes on use, or the majority opinion's cited cases that either follow the MAI language without analysis[1] or involve distinguishable police "stings."[2] There are two statutory reasons.

RSMo § 562.021.2

First is the application of § 562.021.2 to the statutory language defining child enticement, § 566.151.1, and follows our approach in ***State v. Purifoy***, 495 S.W.3d 822 (Mo.App. 2016). According to § 566.151.1:

> A person twenty-one years of age or older commits the offense 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. [my emphasis]

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[1] On claims of insufficient evidence (not instructional error), both ***Osborn***, 318 S.W.3d at 713-14, and ***Fleis***, 319 S.W.3d at 507 n.2, observed that § 566.151 did not require knowledge that the victim was under age 15, but the MAI did, and the state did not claim the MAI was wrong, so these cases did not analyze the issue.

The state sought transfer or rehearing in ***Osborn***, claiming "for the first time that MAI-CR 3d 320.37 does not accurately reflect the elements of the enticement of a child offense, as provided in § 566.151" and that § 566.020.3 renders knowledge of a victim's age an affirmative defense to be raised by the defendant. 318 S.W.3d at 714-15. We properly refused to consider such arguments in ***Osborn*** because they were untimely, ***id***. at 715, but as shown *infra*, they are entirely persuasive and warrant affirmance here.

[2] Unlike this case, the "victims" in ***State v. Faruqi***, 344 S.W.3d 193 (Mo. banc 2011), and ***State v. Davies,*** 330 S.W.3d 775 (Mo.App. 2010), were police operatives masquerading as children. Both cases affirmed *attempt* convictions because each defendant thought he was dealing with a child and took a substantial step toward completing the crime. *See* ***Faruqi***, 344 S.W.3d at 201-03; ***Davies***, 330 S.W.3d at 784-88. I read these cases to confirm that an adult's substantial step toward sexual conduct can be *attempted* child enticement if the victim is underage *or the defendant thinks so*, not that the state must prove both conditions.

This prescribes one culpable mental state (purposefully) which applies to only one element (engaging in sexual conduct), so "a culpable mental state shall not be required as to any other element of the offense." § 562.021.2.[3] *Compare* ***Purifoy***, 495 S.W.3d at 824-25 (per § 562.021.2, "knowingly" applies only to the first element of § 571.010, unlawful possession of firearm, with "no requirement that the State prove a mental state as to the second element ….").

RSMo § 566.020.3[4]

The second reason is § 566.020.3, the affirmative-defense statute cited in footnote 1 *supra*, and its developed history. I begin with the first three sections of original § 566.020 (1977 Mo. Laws p. 662 (eff. Jan. 1, 1979)) because of interplay discussed in Official Comment excerpts immediately following:

> 566.020. 1. Whenever in this chapter the criminality of conduct depends upon a victim's being incapacitated, no crime is committed if the actor reasonably believed that the victim was not incapacitated and reasonably believed that the victim consented to the act. The defendant shall have the burden of injecting the issue of belief as to capacity and consent.
>
> 2. Whenever in this chapter the criminality of conduct depends upon a child's being under the age of fourteen, it is no defense that the defendant believed the child to be fourteen years old or older.
>
> 3. Whenever in this chapter the criminality of conduct depends upon a child's being fourteen or fifteen years of age, it is an affirmative defense that the defendant reasonably believed that the child was sixteen years old or older.
>
> [Excerpts from Official Comment]
>
> This section sets out the special rules for mistake as to incapacity and age in the sexual offenses …. The effect of this section is to change the mental state required for these elements.

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[3] Fully quoting § 562.021.2:

> If the definition of an offense prescribes a culpable mental state with regard to a particular element or elements of that offense, the prescribed culpable mental state shall be required only as to the specified element or elements, and a culpable mental state shall not be required as to any other element of the offense.

[4] Subsequently renumbered and now § 566.020.2 in our new 2017 Criminal Code.

> Subsection 1 in effect requires reasonable belief of incapacity for guilt. This is consistent with present Missouri law which requires the state to prove not only that the victim was incapacitated, because of mental disease … but also that the defendant knew of such incapacity ….
>
> Subsections 2 and 3 provide for absolute liability as to the element of age when the age is less than 14…. However, where the age element is 14 or 15 years, a reasonable mistake can be a defense. The subsections are based on Model Penal Code § 213.6(1) and Federal Criminal Code § 1648(1) (Study Draft) and are a form of compromise between the strict liability majority view that reasonable belief that the victim was older than a particular age is no defense and the minority view that reasonable mistake of fact as to age is a defense in statutory rape cases. Missouri currently follows the majority view …. Since Missouri cases require the state to prove the defendant knew of mental incapacity of the victim (codified in subsection 1), it seems inconsistent not to permit at least an affirmative defense as to mistake of age where the age in question is 14 and above. The Model Penal Code and the Federal Criminal Code provisions recommend 10 as the critical age below which this defense would not be available. The Code here adopts the age of 14 or above, as it is here that a person could reasonably believe someone to be 16 or older.

Thus the state had to show a defendant's scienter only as to mental incapacity, and then only if the defense injected the issue. As to age, it was strict liability if the target age was less than 14, and reasonable mistake of age was an affirmative defense if the target age was 14 or 15 (as in this case).

In 1994, the legislature made slight target-age adjustments that it has maintained to this day:

> 2. Whenever in this chapter the criminality of conduct depends upon a child being *thirteen* years of age or younger, it is no defense that the defendant believed the child to be older.
>
> 3. Whenever in this chapter the criminality of conduct depends upon a child being *under seventeen* years of age, it is an affirmative defense that the defendant reasonably believed that the child was *seventeen* years of age or older.

1994 Mo. Laws p. 1134 (eff. Jan. 1, 1995)(my emphasis and, effective 2017, renumbered as § 566.020.1 & .2).

The target age was 15 in our case (§ 566.151.1), so § 566.020.3 made belief of age an affirmative defense to be raised and proved by Michaud, not an element of the state's case in this non-"sting" situation. Accordingly, the trial court did not err in using the designated MAI verdict director, or in rejecting Michaud's proposed alternative. Having rejected Michaud's two instructional challenges, and finding no merit in his final point, I would affirm the conviction.

DANIEL E. SCOTT, J. – SEPARATE OPINION AUTHOR