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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001489-MR

JOHN KAMPHAUS — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 14-CR-00504

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, JONES AND THOMPSON, JUDGES.

THOMPSON, JUDGE: John Kamphaus appeals from his judgment of conviction after a jury trial for the offense of using electronic communications for the purpose of procuring or promoting a minor to engage in sexual activities in violation of Kentucky Revised Statutes (KRS) 510.155. Kamphaus argues the circuit court erred by failing to suppress the search of his cell phone data incident to arrest,

giving erroneous jury instructions and failing to grant his motion for a directed verdict.

Kamphaus was indicted based on an April 23, 2014 incident for violating KRS 510.155 by using a communication system to procure or promote the use of a minor for any activity in violation of KRS 510.110 (sexual abuse in the first degree). Kamphaus filed a motion to suppress evidence, which was denied.

After a jury trial, the jury convicted Kamphaus as charged. The jury recommended a sentence of thirty-months' incarceration and the circuit court sentenced Kamphaus in accordance with this recommendation.

At the suppression hearing and trial, relevant testimony was provided by Kenton County Officers Steve Benner and Jake Noe, and Kamphaus,[1] resulting in the following undisputed facts: Officer Benner served as an Internet Crimes Against Children (ICAC) task force officer. His ICAC investigations were to identify adults chatting with minors over the internet who were arranging to engage in sexual offenses with these minors. He was trained to never initiate contact, make friend requests or escalate the sexual nature of any conversation beyond what the other participant had done.

[1] Officers Benner and Noe testified at both the suppression hearing and at trial. Kamphaus only testified at trial. Detective Mary Braun testified at trial but her testimony is not relevant to any issue on appeal.

Officer Benner created a Yahoo profile for S.[2] which indicated she was thirteen. However, when anyone asked S.'s age, his policy was to state that she was fifteen-years-old. As S., he participated in the Yahoo groups "Kentucky" and "parenting" and interacted with various people, including "bigdog069000."

On December 12, 2011, "bigdog069000," who was later identified as Kamphaus, initiated contact with S. via Yahoo instant messaging and asked her age. S. told Kamphaus that she was fifteen. Kamphaus continued to contact S. over the next two and one-half years and used sexually explicit language and content when chatting with S.

S. repeatedly told Kamphaus that she was fifteen or about to turn fifteen and made other references to being underage. On June 9, 2013, S. told Kamphaus she had turned fifteen in April. On February 2, 2014, S. told Kamphaus that in April she would be fifteen. She also told him she could not access adult websites, was not old enough to drive, was not physically developed and made various references to being in high school and living at home with her mother. If S. existed, based on the age she initially gave Kamphaus when they first began chatting, she would have turned eighteen by the time she agreed to meet Kamphaus.

[2] We do not identify the full name identified with S. because it appears this same profile may still be in use as part of ongoing police investigations.

Kamphaus's statements responding to S. showed his awareness that S. was a child including his acknowledgment that he was too old for her and stating that he wished he was fifteen. Despite frequent reminders that S. was fifteen, Kamphaus repeatedly directed the conversations to sexual talk, including being naked, wanting to see naked pictures, watching naked females, using adult websites, masturbation, sex toys, underwear, and wanting to engage in oral sex.

During the chats, Kamphaus revealed many accurate personal details about himself including his height, weight, birthday, age, physical description, marital status, that he was a parent, and city and state of residence. These details along with his screen name and its associated email allowed Officer Benner to locate the same person on other social networking sites and obtain additional information. Officer Benner then used all the information he had to identify "bigdog069000" as Ohio resident John Kamphaus.

On April 18, 2014, S. told Kamphaus she turned fifteen on April 17. Kamphaus told S. he wanted to give S. a birthday spanking on her bare bottom.

On April 22, 2014, and just after midnight on April 23, 2014, Kamphaus and S. discussed meeting at a park. Kamphaus asked whether S. would be naked and told her he wanted to engage in oral sex with her and explained exactly what that involved. He told her he would be driving a truck. They continued to chat while Kamphaus traveled toward the park in Kenton County.

Officer Benner obtained a printout of Kamphaus's Ohio driver's license and determined Kamphaus owned two trucks, including a red Ford F-150. He briefed other officers who would be taking part in the stop and gave them Kamphaus's driver's license picture and descriptions of his vehicles.

The park was isolated and had only one approaching road. While Kamphaus was driving, he updated S. as to where he was and Officer Benner identified the approximate time Kamphaus should arrive. About ten seconds after Officer Benner received a message of "here" from "bigdog069000," Officer Benner saw a red F-150 approaching his location across from the park. The arrival of the truck was consistent with when Officer Benner expected it from the location Kamphaus provided. As the truck passed, Officer Benner saw that the truck had Ohio plates. He then ordered another officer to stop it.

Officer Noe initiated the traffic stop pursuant to Officer Benner's radioed direction. He saw a red Ford F-150 with Ohio plates pass him. There was minimal traffic that evening and, during his approximately forty-five minute wait, this was the first vehicle he had seen drive by his location.

After Kamphaus was in custody, Officer Benner looked through the data on Kamphaus's cell phone and found the chat with S. During the trial, the entire transcript of chats between Kamphaus and S. was admitted into evidence

along with photographs of his truck and cell phone, and screen shots of the last chat messages on his cell phone.

According to Kamphaus, he never intended to have sex with an underage girl. He believed he met S. in an adult chatroom, either "married and flirting" or a role-playing chatroom because these were the only chatrooms he visited. He thought S. was an adult role-playing that she was a child.

Kamphaus testified that when he arranged to meet S., he did not know whom he was going to meet. He knew it could be a middle-aged woman or an old man, but he hoped it was a good-looking woman. However, he drove past the park and planned to go home because he did not want to damage his marriage further and he was troubled that the park was so isolated.

We discuss additional facts as relevant to each individual issue.

On appeal, Kamphaus argues the evidence seized in the search of his cell phone data should have been suppressed.

At the suppression hearing, Officer Benner testified it was common practice to search cell phones incident to arrest. He had reason to believe Kamphaus's phone was used in the chats with S., because Kamphaus had explained an hour-long gap earlier in the chat on April 22 and 23 as being because his phone died and Officer Benner located the phone on the center console being charged. He looked at the phone and saw the chat with S. and MapQuest

directions to the park. He used the information he had, including what he found in the phone, to get a search warrant for the phone.

In denying the motion to suppress, the circuit court found that when Kamphaus was stopped there was probable cause to arrest Kamphaus. It then considered whether the search of the cell phone's data was proper as a search incident to arrest. The circuit court ruled that at the time of Kamphaus's arrest, there was some non-binding law, which could support a good faith objective belief that a limited search of cell phone data could be lawful incident to arrest. Therefore, it was reasonable for Officer Benner to believe he could lawfully view chat messages at the scene to confirm that the person who appeared at the park was the same person with whom S. chatted. However, the circuit court ruled that once Kamphaus's identity as the chat message participant was confirmed, any further search of the cell phone was outside of the limits of the warrant exception and suppressed the MapQuest inquiry and geographic location.

There is no dispute that the circuit court's findings of fact in denying Kamphaus's motion to suppress in part are supported by substantial evidence. Therefore, "[b]ased on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law." *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002).

At the time of Kamphaus's arrest, the United States Supreme Court had previously granted certiorari for but not yet decided *Riley v. California*, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014). It accepted certiorari because of a spilt among the circuits and states about the admissibility of evidence seized from cell phone data without a warrant. Therefore, Kamphaus argues, there was no clearly defined exception to the warrant requirement that permitted search of cell phones' data and the officers could not rely on previous law as a good faith basis for conducting such a search.

In *Riley*, the United States Supreme Court held that officers must generally secure a warrant before conducting a search of data on a cell phone seized incident to arrest. *Id.* at 2485. In arriving at this conclusion, the Court analyzed the reasoning behind the three cases which established the parameters of what could properly be searched incident to arrest, *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); and *Arizona v. Gant*, 556 U.S. 332, 350, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). *Riley*, 134 S.Ct. at 2483–85. The *Riley* Court noted that in each case "concerns for officer safety and evidence preservation underlie the search incident to arrest exception." *Id.* at 2484. However, once a cell phone has been seized, these concerns do not justify a warrantless search of cell phone data.

> Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one.

Id. at 2485. Therefore, while data stored on a cell phone might aid an officer's safety indirectly and there might be a small risk that data could be wiped from a phone remotely or the data encrypted, these concerns could not justify a general exception to the requirement for a search warrant. *Id.* at 2485-88.

Riley analogized that searching cell phone data is equivalent to trying to search the contents of a locked trunk which was held to require a search warrant in *United States v. Chadwick*, 433 U.S. 1, 15, 97 S.Ct. 2476, 2486, 53 L.Ed.2d 538 (1977), abrogated on other grounds by *California v. Acevedo*, 500 U.S. 565, 575, 111 S.Ct. 1982, 1989, 114 L.Ed.2d 619 (1991). *Riley*, 134 S.Ct. at 2489. While a cell phone may be contained in someone's pocket, searching its data "would typically expose to the government far *more* than the most exhaustive search of a house[.]" *Id.* at 2491.

> Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life." The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which

> the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.

Id. at 2494–95 (internal citation omitted). However, in appropriate individual cases, the exigent circumstances exception may apply. *Id.* at 2494.

Because *Riley* announced a new rule for the conduct of criminal prosecutions, its holding is to be applied retroactively to all cases pending on direct review. *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987); *Whittle v. Commonwealth*, 352 S.W.3d 898, 905 (Ky. 2011). Therefore, even though Officer Benner's search was conducted prior to *Riley*, *Riley* applies and Officer Benner's warrantless search of Kamphaus's cell phone data incident to arrest was illegal because no exigency existed to justify such a search.

We next examine whether the cell phone data should be excluded from suppression under the good faith exception. Pursuant to *Davis v. United States*, 564 U.S. 229, 241, 131 S.Ct. 2419, 2429, 180 L.Ed.2d 285 (2011), "when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities." Under this good-faith exception, "[e]vidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." *Id.*

In *Parker v. Commonwealth*, 440 S.W.3d 381, 387 (Ky. 2014), the Kentucky Supreme Court adopted this rule as follows: "when law enforcement officers conduct a search in objectively reasonable reliance on clearly established precedent from this Court or the United States Supreme Court, the exclusionary rule does not apply to exclude the admission of evidence obtained as a result of the search."

At the time Officer Benner searched Kamphaus's cell phone data incident to arrest, precedent supported the seizure of the cell phone itself from the truck and its search as a merely physical item. Pursuant to *Gant*, 556 U.S. at 343, 129 S.Ct. at 1719, an automobile can be searched incident to a recent occupant's arrest if the police have reason to believe that the vehicle contains evidence relevant to the crime for which the occupant was arrested. Officer Benner had a reason to believe Kamphaus's truck contained evidence of his crime, the cell phone from which Kamphaus was messaging S. Kamphaus previously explained a gap in messages based on his cell phone being out of power and messaged S. "here" a few seconds before he arrived at the park. *Riley* confirms that it may be proper to seize a cell phone incident to arrest and examine its physical properties. *Riley*, 134 S.Ct. at 2485.

However, there was no clearly established precedent from the Kentucky Supreme Court or the United States Supreme Court specifically

authorizing the search of cell phone data incident to arrest at the time Officer Benner did so. Additionally, the *Riley* decision's analogy of cell phone data to a locked trunk indicates that any reliance on its past cases to authorize a search of cell phone data would be misplaced.

In *United States v. Jenkins*, 850 F.3d 912, 920 (7th Cir. 2017), the Seventh Circuit held that existing United States Supreme Court precedent did not authorize the search of cell phone data incident to arrest prior to *Riley* and, thus, the good faith exception under *Davis* was not applicable to save such a search. The Court explained "[t]he *Davis* exception . . . does not reach so far as to excuse mistaken efforts to *extend* controlling precedents." *Jenkins*, 850 F.3d at 920 (quoting *United States v. Rivera*, 817 F.3d 339, 346 (7th Cir. 2016) (Hamilton, J. concurring in part and concurring in the judgments)). *But see United States v. Lustig*, 830 F.3d 1075, 1079–85 (9th Cir. 2016) (interpreting existing United States Supreme Court precedent expansively to determine that it did authorize a search of a cell phone's data incident to arrest). We hold that in Kentucky, the good faith exception did not allow the search of cell phone data incident to arrest prior to the *Riley* decision.

However, our determination that the good faith exception does not save this search does not end our inquiry. "It is well-settled that an appellate court

may affirm a lower court for any reason supported by the record." *Carter v. Commonwealth*, 449 S.W.3d 771, 776–77 (Ky.App. 2014).

Riley did not prohibit all searches of cell phone data, but only required that a warrant be obtained first. *Riley*, 134 S.Ct. at 2495; *Hedgepath v. Commonwealth*, 441 S.W.3d 119, 130 (Ky. 2014). A warrant was obtained for Kamphaus's cell phone data, but the warrant affidavit included tainted evidence from Officer Benner's search of the cell phone data incident to arrest.

> In . . . situations where tainted evidence is actually included in the warrant affidavit, courts have found that its "mere inclusion ... does not, by itself, taint the warrant or the evidence seized pursuant to the warrant," such that exclusion is automatically required. *United States v. Reilly*, 76 F.3d 1271, 1282 n.2 (2nd Cir. 1996) (internal quotation marks and citation omitted). Instead, in determining whether to apply the exclusionary rule, courts remove the illegally obtained fact from the affidavit and "consider[ ] whether there is still sufficient information to establish probable cause" for the search. *United States v. Davis*, 430 F.3d 345, 357–58 (6th Cir. 2005); *see also Reilly*, 76 F.3d at 1282 n.2.

United States v. Bah, 794 F.3d 617, 634 (6th Cir. 2015). *See United States v. Lewis*, 615 F.App'x 332, 337-38 (6th Cir. 2015) (determining that because there was more than enough evidence in the affidavit to establish probable cause even without the evidence from the cell phones, the constitutional violation of their search prior to a warrant, constituted harmless error beyond a reasonable doubt).

There was more than enough evidence to support the search warrant for Kamphaus's phone data without relying on the prior search of the phone, which revealed the latest Yahoo messages between "bigdog069000" and S. Officer Benner had two and one-half years of messages between "bigdog069000" and S. that included the messages on Kamphaus's cell phone. Officer Benner had already identified that "bigdog069000" was Kamphaus from his investigation before April 23, 2014. The personal details "bigdog069000" provided to S. matched Kamphaus.

On April 23, 2014, Officer Benner was expecting "bigdog069000," whom he believed was Kamphaus, to arrive at a deserted park at a particular time based on the arrangements made with S. and confirming messages sent by "bigdog069000." A truck which matched the make, model and color of one of Kamphaus's vehicles arrived at the expected time with Ohio plates. After the truck was stopped, it was confirmed that the arrested driver was Kamphaus. The examination of the cell phone was only used as further confirmation of Kamphaus's identity as "bigdog069000" and superfluous when considered in conjunction with the other information Officer Benner had acquired. Therefore, the search warrant would have been granted without the cell phone data evidence.

We also conclude that even if the later search of the phone's data was fruit of the poisonous tree, the failure to exclude it from Kamphaus's trial was

harmless. In *Jenkins*, 850 F.3d at 920, the Court explained that fruit of an unconstitutional search can be harmless if it is clear beyond a reasonable doubt that a rational jury would have, absent the error, still found the defendant guilty. Here, all the content of the messaging was admissible without a search warrant and the cell phone data was only relevant for establishing Kamphaus's identity as "bigdog069000." Omitting the cell phone data, there was still overwhelming evidence to establish his identity.

Kamphaus argues the circuit court erred in its jury instructions regarding KRS 510.155 by: (1) including the language "other prohibited activity" and (2) failing to define "procuring" and "promoting."

KRS 510.155 reads as follows:

> **510.155 Unlawful use of electronic means originating or received within the Commonwealth to induce a minor to engage in sexual or other prohibited activities; prohibition of multiple convictions arising from single course of conduct; solicitation as evidence of intent**
>
> (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, 510.080, 510.090, 510.110, 529.100 where that offense involves commercial sexual activity, or 530.064(1)(a), or 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.

The Commonwealth charged that Kamphaus violated KRS 510.155 by using an electronic communications system for the purpose of procuring or promoting the use of a peace officer posing as a minor for any activity in violation of KRS 510.110, which provides in part:

> (1) A person is guilty of sexual abuse in the first degree when:
>
> . . .
>
> (c) Being twenty-one (21) years old or more, he or she:
>
> 1. Subjects another person who is less than sixteen (16) years old to sexual contact[.]

Kamphaus and the Commonwealth submitted proposed jury instructions. Kamphaus's proposed instruction read as follows:

> Use of an Electronic Communications System to Induce or Procure a Minor to Commit a Sexual Offense
>
> You will find the Defendant guilty of Use of an Electronic Communications System to Induce or Procure a Minor to Commit a Sexual Offense under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county on or about April 23, 2014, and before the finding of the Indictment herein, John Kamphaus, being twenty-one (21) years old or more, knowingly used a computer, cellular phone, or other electronic device for the purpose of procuring or promoting another person who is less than sixteen (16) years old to sexual contact
>
> AND,
>
> B. That at that time the other person was a police officer whom John Kamphaus believed to be an actual person less than sixteen (16) years old.

During an initial jury instruction conference, the circuit court discussed the parties' proposed instructions and the first draft of the circuit court's instructions. Kamphaus argued that the instructions should contain a specific allegation about sexual abuse in the first degree, with a definition of sexual abuse, rather than the instructions being worded with "other prohibited activity" and the instructions should not include a definition for "minor." The Commonwealth

argued it was appropriate to use the language "other prohibited activity" because it was contained in the statute and that prohibited activity equaled sexual abuse.

The circuit court determined it was appropriate to limit the prohibited acts to sexual abuse and use "subjecting to" language to clarify that the sexual abuse did not need to have occurred. The circuit court agreed with Kamphaus that the instructions should not include a definition for "minor" and the circuit court eliminated that definition.

Later, at a subsequent jury instruction conference, the circuit court read the parties its revised instructions which limited prohibited acts to prohibited acts of sexual conduct in the first degree. The parties made no further objections.

Instruction No. 4 as provided to the jury defined "knowingly," "prohibited activity" and "sexual contact." It defined "prohibited activity" as "an activity in violation of KRS 510.110 (Sexual Abuse in the First Degree)." Kamphaus's proposed jury instruction only defined "knowingly" and "sexual contact."

Instruction No. 5 read as follows:

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

A. That in Kenton, County on or about April 23, 2014, and before the finding of the indictment herein, he knowingly used a computer, cellular telephone, or other electronic device for the purpose of procuring or promoting the use of an individual for the prohibited activity of Sexual Abuse in the First Degree;

AND,

B. That the prohibited activity sought by Defendant involved subjecting the individual to sexual contact;

AND,

C. That at that time Defendant was twenty-one years or more;

AND,

D. That at that time, the individual so contacted was a peace officer posing as a fifteen year old female;

AND,

E. That at that time, Defendant believed that the individual so contacted was a fifteen year old female.

Kamphaus argues the circuit court erred in its jury instructions by stating the offense was "Unlawful Use of Electronic Means to Induce a Minor to Engage in Sexual or Other Prohibited Activity" where the language "other prohibited activity" is only used in the heading of the statute and not in the statute itself. Kamphaus argues including this language broadened the meaning of the

statute and, thus, the jury might have concluded that embarrassing sexual conversations are prohibited when such things are not prohibited by the statute.

While Kamphaus provided an alternative instruction which did not include the "other prohibited activities" language and objected to use of this language during the initial discussion with the circuit court about jury instructions, Kamphaus did not explain that his objection to this language was based upon it not being included in KRS 510.155. His proposed instruction also included the term "induce," which was only contained in the heading of KRS 510.155. He did not raise any objection to the revised jury instructions that the court presented to the parties during the subsequent jury instruction conference. As discussed in *Smith v. Commonwealth*, 370 S.W.3d 871, 875 (Ky. 2012):

> Silence as the trial court proceeded down what Appellant now claims to be an erroneous path would have been reasonably perceived as agreement with the trial court's instructions, and falls far short of the fair and adequate notice required by [Kentucky Rules of Criminal Procedure] RCr 9.54. While a party generally may preserve instructional error by tendering to the trial court a correct formulation of the jury instruction, he may not at the same time sit idly by during the jury instruction conference and create the appearance of acquiescence to erroneous instructions.

As explained in *Martin v. Commonwealth*, 409 S.W.3d 340, 346 (Ky. 2013):

> While a timely objection in the trial court is always necessary to preserve the right of appellate review of a

> defectively phrased instruction, review under RCr 10.26 is appropriate when an unpreserved error is palpable and when relief is necessary to avoid manifest injustice resulting from a defective instruction.

Accordingly, we review this unpreserved allegation of defect in the court's instruction for palpable error pursuant to RCr 10.26.

We agree with Kamphaus that the title of KRS 510.155 was added during codification and should not be considered part of the statute. KRS 446.140 provides that "[t]itle heads, chapter heads, section and subsection heads or titles . . . in the Kentucky Revised Statutes, do not constitute any part of the law[.]" *See Crouch v. Commonwealth*, 323 S.W.3d 668, 675 n.15 (Ky. 2010) (explaining only a title given in a legislative enactment should be entitled to any weight in statutory construction). None of the titles of the original legislative enactment of this statute or its amendments uses the "other prohibited activities" language, so it was not proper to use this language in a jury instruction. However, this error does not require reversal because it does not constitute palpable error.

"Where an instruction, taken as a whole, fairly and properly expresses the law applicable to the case, no just ground for complaint exists, even though an isolated or detached clause or expression is in itself inaccurate or incomplete." *Hamilton v. CSX Transp., Inc*., 208 S.W.3d 272, 277 (Ky.App. 2006) (quoting *Speith v. Helm,* 301 Ky. 451, 455–56, 192 S.W.2d 376, 378 (1946)). The circuit court required the jury in Instruction Five B to conclude "[t]hat the prohibited

activity sought by Defendant involved subjecting the individual to sexual contact" and defined "prohibited activity" in Instruction Four as "an activity in violation of KRS 510.110 (Sexual Abuse in the First Degree)." By doing so, even though the circuit court used the term "prohibited activity" which was not contained in the statute in defining the crime, this phrase was essentially superfluous where it was defined as a crime listed in the statute. This usage eliminated any possibility that the jury could convict Kamphaus based on him engaging in sexual conversations with S.

Kamphaus also argues the circuit court erred in its jury instructions by failing to define the terms "procuring" and "promoting" for the jury, he did not violate KRS 510.110 and his communications did not amount to having procured or promoted violating KRS 510.155. He argues that other statutes which use the "promoting" language would not make any of his actions prohibited and "promoting" and "procuring" involves a monetary aspect that was not present here. He argues that because he never entered the park or met with S. he did nothing more than engage in protected speech and because these terms comprise an element of his offense, the failure to define them rendered the instructions confusing and the verdict should be set aside.

Kamphaus failed to submit proposed definitions for "procuring" and "promoting" or request that the circuit court provide them. Therefore, this error is unpreserved and we review it for palpable error.

"A formal definition is not required to be included in jury instructions where the jury can understand the term without such a definition." *Commonwealth v. Hager*, 35 S.W.3d 377, 379 (Ky.App. 2000).

> In numerous cases [the Kentucky Supreme Court] has held that words or expressions which are commonly understood and are generally simple and well-known should not be defined. Such a rule is consistent with our preference for bare-bones instructions which may be fleshed out during summation. Moreover, our cases caution against instructions which over-emphasize an aspect of the evidence or amount to a comment on the evidence. On the other hand, we have found error in the failure to define terms when the law ascribes a particular meaning or when a common term is used as a term of art.

McKinney v. Heisel, 947 S.W.2d 32, 33–34 (Ky. 1997) (internal citations omitted).

Kamphaus argues that "promoting" and "procuring" have particular meanings which cannot be understood without the circuit court providing a definition. We disagree.

In the unpublished case of *Clark v. Commonwealth*, No. 2008-CA-001906-MR, 2009 WL 5125009, 2 (Ky.App. 2009) (unpublished),[3] the Court relied on the definition of "promote" provided in KRS 531.300(7), which applies to crimes involving sexual exploitation of minors (rather than violations listed in KRS 510.155) and a simple dictionary definition of "procure." It concluded that to survive a directed verdict, the Commonwealth simply had to produce evidence showing that the defendant used an electronic device for the purpose of getting a peace officer whom the defendant believed to be a minor, to engage in an act prohibited by the statute. *Clark*, 2009 WL 5125009 at 2. His intent to use the electronic device for this purpose was enough even if the prohibited act never took place. *Id.* Therefore, because these terms had their ordinary meaning, the jury could make a determination without requiring specific definitions for these terms.

We also disagree with Kamphaus's assertion that he did no more than engage in protected First Amendment speech. As discussed in *United States v. Williams*, 553 U.S. 285, 297, 128 S.Ct. 1830, 1841, 170 L.Ed.2d 650 (2008), "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection." Therefore, a law can properly prohibit offers to provide or requests to obtain child pornography but cannot prohibit advocacy speech. *Id.* at

[3] We discuss this unpublished opinion pursuant to Kentucky Rules of Civil Procedure 76.28(4)(c) because there are no published cases discussing the definitions for KRS 510.155 and how to interpret those terms.

298-99, 128 S.Ct. at 1842. Kamphaus's speech for purposes of arranging to meet S. so he could engage in oral sex with her was not protected speech.

Finally, Kamphaus argues the circuit court should have granted his motion for a directed verdict because there was no evidence the persona of the police officer was under age sixteen. He argues S. could not be fifteen in 2011, when Kamphaus first contacted her, and when he was arrested in 2014.

"On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

It was within the jury's purview to resolve the factual dispute of how old S. was when Kamphaus arranged to meet her. Therefore, considering all the evidence the jury had before it regarding S.'s age, the jury could reasonably find that S. was fifteen at the time of the arranged meeting. The circuit court did not err when it denied Kamphaus's motion for a directed verdict.

Accordingly, we affirm Kamphaus's judgment of conviction for violating KRS 510.155.

ALL CONCUR.

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