Filing # 72879800 E-Filed 05/31/2018 11:17:21 AM

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN
AND FOR LEON COUNTY, FLORIDA

Case No. 17-CF00526

STATE OF FLORIDA,

v.

DARREL D. HARVEY,

Defendant.
_______________________/

RENEWED MOTION FOR JUDGMENT OF ACQUITTAL

The Defendant, DARREL D. HARVEY, by and through his undersigned attorney, moves the Court for an Order granting his Motion for Judgment of Acquittal ("Motion") pursuant to Fla. R. Crim. Pro. 3.380, and in support states as follows:

1. The Defendant was arrested on February 12, 2017. The Defendant was found guilty on three counts on May 23, 2018. Count I is Traveling to Meet a Minor under section 847.0135(4)(a), Florida Statutes, a second degree felony. Count II is for Prohibited Uses of Computer Services or Devices, section 847.0135(3)(a), Florida Statutes, a third degree felony. Count III is for Tampering with or Fabricating Physical Evidence under section 918.13, Florida Statutes, a third degree felony.

2. The evidence at trial showed that the Defendant had communications with an investigator purporting to be a minor. Communications began early in the morning on February 12, 2017, and continued until that evening, when the Defendant agreed to meet the investigator at a local store, and travelled to the store.

3. It would violate double jeopardy for the Defendant to be sentenced under both 847.0135(3)(a), and section (4)(a) for the same conduct. The Florida Supreme Court in *State v. Shelley*, found that a violations of section 847.0135(3) was subsumed into a violation of section 847.0135(4). 176 So. 3d 914 (Fla. 2015). This was so even though in *Shelley*, communications between the investigator and the defendant took place "Over the course of several days." *Id.* at 916.

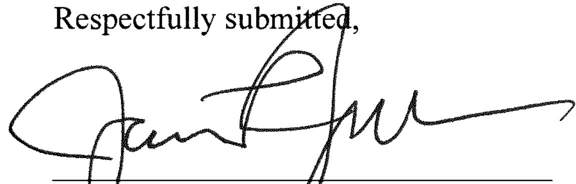
4. As the Court explained, "both the United States and Florida Constitutions contain double jeopardy clauses that prohibit subjecting a person to multiple prosecutions, convictions, and punishments for the same criminal offense." *Id.* at 917 (internal citation omitted). Applying the "*Blockburger* same-elements test codified in section 775.021(4), Florida Statutes" the Court found that subsection (3) is subsumed into subsection (4). *Id.* at 919. "The reasoning of *Shelley* equally applies to violations of sections 847.0135(4)(a) and (3)(a)." *Assanti v. State*, 227 So. 3d 679, 680 (Fla. 1st DCA 2017), reh'g denied (Oct. 16, 2017) (citing *Lashley v. State*, 194 So.3d 1084, 1085 (Fla. 1st DCA 2016)).

5. Importantly, the Defendant's conduct is only charged as a single incident. The Amended Information only alleges that the Defendant engaged in conduct on a single day, February 12, 2017. As such, the Defendant is entitled to judgment of acquittal on Count II to remedy the violation of double jeopardy.

6. The Defendant renews and incorporates the written Motion for Judgment of Acquittal filed with the Court at the close of the State's evidence on May 23, 2018, as though fully restated herein. A copy of that motion, which was given by hand to the Court, is attached hereto as Exhibit A.

WHEREFORE the Defendant respectfully requests the Court grant his Motion and Acquit the Defendant on all counts.

Respectfully submitted,



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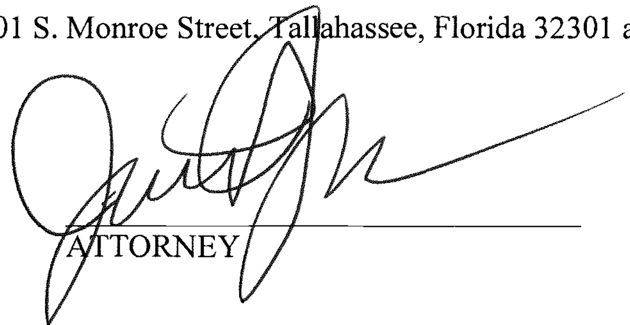
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by electronic mail via the Florida Court E-Filing Portal this 31st day of May, 2018, to John Hutchins, State Attorney's Office, Leon County Courthouse, 301 S. Monroe Street, Tallahassee, Florida 32301 at hutchinsj@leoncountyfl.gov.



ATTORNEY

IN THE CIRCUIT COURT OF THE
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Case No. 17-CF00526

STATE OF FLORIDA,

Plaintiff,

v.

DARREL D. HARVEY,

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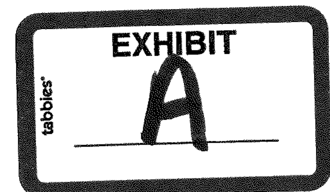
MOTION FOR JUDGMENT OF ACQUITTAL

The Defendant, DARREL D. HARVEY, by and through his undersigned attorney, moves the Court for an Order granting his Motion for Judgment of Acquittal ("Motion") pursuant to Fla. R. Crim. Pro. 3.380, and in support states as follows:

1. The Defendant was arrested on February 12, 2017. The Defendant is charged in a three-count information with Count I being Traveling to Meet a Minor under section 847.0135(4)(a), Florida Statutes, a second degree felony. Count II is for Prohibited Uses of Computer Services or Devices, section 847.0135(3)(a), Florida Statutes, a third degree felony. Count III is for Tampering with or Fabricating Physical Evidence under section 918.13, Florida Statutes, a third degree felony.

2. The State has produced no substantial competent evidence as to Count I as it is pleaded in the amended information. The unrefuted evidence clearly shows Mr. Harvey cannot be guilty of Count III as a matter of law. Further, the State has failed to meet its burden of proof for Counts I and II.



Count I:

3. Count I is pleaded such that Mr. Harvey was travelling for the purpose of some unlawful conduct under one of several chapters "after using a computer [etc.] . . . to seduce [etc.] . . . another person believed to be a child **to engage in or to otherwise engage in other unlawful sexual conduct**. . . ." Amended Information. It is this language, "to engage in or to otherwise engage in other unlawful sexual conduct" that there is no evidence of in the record. "[O]ther unlawful sexual conduct" is the only thing Mr. Harvey is alleged to have used a computer to accomplish.

4. The Court cannot find there is substantial competent evidence of "other unlawful sexual conduct" for three reasons. First, other unlawful sexual conduct must be conduct not defined in Chapters 794, 800, or 827, Florida Statutes. There is no evidence in this case of any conduct defined as unlawful sexual conduct outside those chapters. Second, the jury cannot be allowed to decide what conduct is "otherwise unlawful" unless that conduct is defined by statute, this would allow the jury to create an ex post facto law. Third, the statute is drafted in such a way that conduct that is "otherwise unlawful" must be "with a child" it does not include conduct with a "person believed by the person to be a child."

5. Mr. Harvey is only charged in Count I with using a computer for the purpose of "otherwise unlawful sexual conduct." While Mr. Harvey is alleged to have **travelled** for the purpose of engaging in some illegal act described in Chapter 794, Chapter 800, or Chapter 827, Florida Statutes, or to otherwise engage in other unlawful sexual conduct,[1] the traveling is alleged

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[1] Defendant does not waive the claim that, as pleaded, this bucket of possible violations is insufficient as a matter of law to put Defendant on notice of the claim against him, but Defendant recognizes the Court has addressed this on Motion to Dismiss, and will not address this claim at length. *See Richards v. State*, 237 So. 3d 426 (Fla. 2d DCA 2018).

to have taken place only after Mr. Harvey used a computer to lure or entice a person to engage in "otherwise unlawful sexual conduct." Amended Information. "Otherwise unlawful sexual conduct" is not defined in statute, and no Florida Court has addressed this language. However, principles of statutory interpretation dictate that the conduct must be some conduct not described in Chapters 794, 800, or 827, Florida Statutes.

6. Courts, especially in the criminal context, are "required to give effect to 'every word, phrase, sentence, and part of the statute'" *State v. Knighton*, 43 Fla. L. Weekly S68 (Fla. Feb. 1, 2018) (citation omitted). Because the state has pleaded its case in this unusual way, limited to "otherwise unlawful sexual conduct" in the Amended Information, it is only under the theory as alleged that Mr. Harvey can be convicted. *See Deleon v. State*, 66 So. 3d 391, 394 (Fla. 2d DCA 2011) (rejecting argument that defendant could be convicted of crime based on theory of crime different than that alleged in the information). Due process prohibits an individual from being convicted of an uncharged crime. *Morgan v. State*, 146 So. 3d 508, 512 (Fla. 5th DCA 2014) (collecting cases, citing *Cole v. Arkansas,* 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948); *Jaimes v. State,* 51 So.3d 445, 448 (Fla. 2010); *Crain v. State,* 894 So.2d 59, 69 (Fla.2004)). Consistent with this rule, a criminal defendant is entitled to a trial on the charges contained in the information and may not be prosecuted for uncharged offenses, even if they are of the same general character or constitute alternative ways of committing the charged offense. *Id.* (citing *Trahan v. State*, 913 So.2d 729, 730 (Fla. 5th DCA 2005); *D.R. v. State*, 790 So.2d 1242, 1244–45 (Fla. 5th DCA 2001); *Zwick v. State*, 730 So.2d 759, 760 (Fla. 5th DCA 1999)).

7. Florida's sister court, the Georgia Supreme Court, has interpreted language similar to the statute at issue. *See Wetzel v. State*, 298 Ga. 20, 29, 779 S.E.2d 263, 270 (2015). The *Wetzel* court interpreted a criminal statute that could be violated by violating several chapters

followed by the clause "or to engage in any conduct that by its nature is an unlawful sexual offense against a child." *Id.* (quoting OCGA § 16–12–100.2(d)(1)). This final clause had to be separate conduct, not included in the previously listed chapters, to prevent the language from being superfluous. The court reasoned that the clause was placed there by the legislature "so that it [the statute] would not need to be amended any time a new sexual offense is enacted." *Id.* Similarly, the clause in section 847.0135(4)(a), Florida Statutes, lists several chapters and includes a final clause that encompasses only conduct outside the scope of those chapters. Otherwise, the final clause, "otherwise unlawful sexual conduct" would be superfluous.

8. Even more than the Georgia statute, use of the word "otherwise" in section dictates that the conduct must be some conduct not included in the chapters listed before the clause. "Otherwise" means "in a different way or manner." "Otherwise." Merriam-Webster.com. Merriam-Webster, n.d. Web. 18 May 2018.[2] Thus, the conduct must be unlawful, but in a different way or in a different manner than as described in the previously listed chapters, Chapters 794, 800, or 827, Florida Statutes.

9. To refute an accusation of a statute being unconstitutionally vague, it "must give persons of ordinary intelligence adequate notice of the proscribed conduct." *State v. Fuchs*, 769 So.2d 1006, 1008 (Fla. 2000). Yet, using the statutory construction analysis of *Wetzel*, the court need not determine that section 847.0135 is unconstitutionally vague in order to find its application unconstitutional here. Had the State provided a statute that constituted "otherwise unlawful" conduct to incorporate into section 847.0135, Florida Statutes, a jury could determine Harvey's innocence or guilt on that basis. However, a jury should not be allowed to retroactively interpret

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[2] Available at https://www.merriam-webster.com/dictionary/otherwise

what conduct is "otherwise unlawful" without being given a statutory offense with which to apply the facts. *Wetzel*, 298 Ga. at 27. This allowance would permit a jury to make findings based not on matters of fact but their own morality regardless of legality. Thus, the criminal conduct must be defined in a statute for a jury to apply facts to it.

10. There are several places where the Legislature has defined unlawful "sexual conduct" but none of them are relevant, and no evidence has been produced related to them. For instance, making an obscene communication for money is unlawful sexual conduct, i.e. paid phone sex. § 365.161(2)(a), Florida Statutes. So is publishing pornography for the purpose of causing emotional distress to the person depicted, commonly called revenge pornography. § 784.049(2)(c), Fla. Stat. Similarly, bestiality is defined as unlawful sexual conduct. § 828.126(1)(a), Florida Statutes. There is no evidence in this case related to any of these crimes.

11. Finally, the uncontroverted evidence in this case shows that the Defendant was communicating with an adult posing as a minor, not an actual minor. Section 847.0135(4)(a), Florida Statutes, is drafted in such a way that travelling for the purpose of engaging in certain conduct is a violation whether the defendant is communicating "with a child or with another person believed by the person to be a child." However, this conduct is a violation only "after using a computer [etc.] . . . to . . . otherwise engage in other unlawful sexual conduct *with a child*." This final clause lacks the "person believed by the person to be a child" language. Because the Defendant is only charged in Count I with having used a computer "to engage in or to otherwise engage in other unlawful sexual conduct," (Amended Information) the statute requires this computer use to have been with a child. There is no competent substantial evidence that the

investigator, Ms. Titkanich, was a child at the time of the investigation, and the Defendant is entitled to judgment of acquittal on Count I.

12. Not only has the state refused to name a particular underlying crime, providing a whiff of what it thinks the Defendant was travelling for the purpose of, there is no way to guess what other unlawful sexual conduct the state thinks the Defendant used a computer to solicit.

Both Counts I and II.

14. The Defendant is entitled to judgment of acquittal on both counts I and II because the state has failed to make their burden of showing the elements of both counts, and because the Amended Information is impermissibly vague. Both Counts I and II include the language "knowingly" in the charges. The State has not given sufficient evidence to show that Harvey knew that the officer he was communicating with was a child. Knowledge is "[a]n awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact." *Knowledge*, Black's Law Dictionary (10th ed. 2014). The statute also uses the standard of "believed by the person to be a child." Believe is "[t]o feel certain about the truth of; to accept as true." *Believe*, Black's Law Dictionary (10th ed. 2014). Harvey did not display a subjective belief that the officer he was messaging was under 18. The communications were so ambiguous as to fail to show that Harvey would have believed that the person was a child let alone the existence of doubt to this fact. In multiple texts Harvey explicitly says that he does not believe the girl is under 18 and asks for clarification on the age which he does not get. The pictures sent to Harvey were in fact of a woman 28 years of age.

15. Further, both counts also charge that Harvey's actions were taken to "seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice a child," tracking the language of

the statute. The character of Harvey's actions have not been sufficiently proven to reflect these charges. "The act or an instance of requesting or seeking to obtain something; a request or petition." *Solicit*, Black's Law Dictionary (10th ed. 2014). "To lure or induce; esp., to wrongfully solicit (a person) to do something." *Entice*, Black's Law Dictionary (10th ed. 2014). Without defining each word, the language used in the statute would require the State to show acts of communication between the officer and Harvey that demonstrate some kind of request for sexual conduct acts. The record of communications does not show that Harvey requested sex from the child. He does not try to lure the child into a sexual encounter, choosing instead to meet in a public place. Harvey's actions reiterate that he was confused by the ambiguity surrounding the age the officer purported to be and wanted to merely see what age the person was. While the conversation between the investigator and the Defendant included sexual themes, the Defendant's conduct never raised to the level of requesting, luring, or inducing some unlawful sexual conduct with the officer.

16. Mr. Harvey's right to due process is being threatened by these overly broad counts brought by the State. With no specific illegal conduct alleged from a statute, the language of the charges track the general phraseology of sections 847.0135(3)(a) and (4)(a), Florida Statutes, and does not give proper notice as to what conduct Mr. Harvey is defending against. The discussion immediately above is an attempt to guess as to what conduct the counts refer. However, it demonstrates the failure of the State to adequately encompass any of the activity Mr. Harvey took part in.

Count III:

17. Further, the uncontroverted evidence in this case demonstrated that Mr. Harvey, rather than deleting evidence, archived it to the cloud for preservation, and sent the text messages

to his attorney within days of his arrest. This cannot, as a matter of law, constitute tampering with evidence. *Costanzo v. State*, 152 So.3d 737, 739 (Fla. 4th DCA 2014) (holding that texting to a friend and emailing to an attorney a video record to be used in trial did not constitute destroying evidence as referenced in section 918.13, *Florida Statutes*).

WHEREFORE the Defendant respectfully requests the Court grant his Motion and Acquit the Defendant on all counts.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by hand delivery on parties listed below, this ___ day of __________, 2018.

John Hutchins
State Attorney's Office
Leon County Courthouse
301 S. Monroe Street
Tallahassee, Florida 32301
hutchinsj@leoncountyflgov

s/_______________
Attorney