DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2006

STEVEN GROHS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D04-2016

[February 1, 2006]

PER CURIAM.

The appellant, Steven Grohs, appeals his conviction for violating section 847.0135(3), Florida Statutes, prohibiting the use of computer services to seduce, solicit, lure, or entice a minor into committing an illegal act. Because we find that the trial court abused its discretion by improperly answering a jury question posed to the court during deliberations, we reverse.

This case involves an undercover police operation that resulted in the arrest of Grohs for his attempt to solicit what he thought was a fifteen-year-old boy for sexual purposes. The undercover detective, pretending to be a fifteen-year-old boy, entered an on-line chat room in which Grohs had an active user name. Grohs, believing that he was communicating with a fifteen-year-old boy, began an on-line conversation with the detective. During their conversation, the detective asked Grohs if they could talk again and Grohs in response sent the detective his cell phone number. The detective and Grohs continued to converse with each other on-line and then engaged in two recorded phone conversations. It was not over the computer, but only during the telephone conversations, that Grohs solicited what he thought was a fifteen-year-old boy. Transcripts of the on-line conversations and recordings of the phone conversations were presented to the jury.

After the State rested its case, Grohs moved for judgment of acquittal, arguing that the State failed to prove that any solicitation had occurred over the computer, as required by section 847.0135(3). The trial court

reserved ruling on the motion. Following closing arguments, Grohs renewed his motion for judgment of acquittal, and the trial court again reserved ruling on the motion.

During deliberations, the jury asked the following question to the trial court: "Does 'utilizing' a computer on-line service mean one can use the contents of a cell phone call as evidence if the cell phone number was provided in an e-mail?" The court asked the juror to clarify the question, and the juror responded: "If he (Grohs) provided a cell phone number in an e-mail, and if it's true that the cell phone had content which violated element one, can we do that linkage, or does the entire violation of the law have to be an e-mail or chat room?" The trial court then asked the attorneys to a bench conference to discuss how to respond to the jury's question. The trial court acknowledged that the answer to this question was the "crux" of the defense's motion for judgment of acquittal and decided that the answer to the question was either "yes" or "no." The trial court answered the question in the affirmative and so advised the jury.

The reason that the trial court found the answer to the jury's question to be the "crux" of the defense motion is because section 847.0135(3) is susceptible of different interpretations. Section 847.0135(3) provides that it is unlawful for a person to knowingly utilize a "computer on-line service, internet service, or local bulletin board service" to solicit or attempt to solicit a child for sexual purposes. On the one hand, the statute can be construed narrowly by strictly interpreting the terms "utilize a computer on-line service, internet service, and local bulletin board service" to apply only to solicitation that occurs on a computer on-line service, internet service, or local bulletin board service. On the other hand, one could interpret the terms more broadly to include, for example, solicitation occurring during phone conversations that were initiated through a computer on-line service, internet service, or local bulletin board service.

On appeal, Grohs argues that the trial court invaded the province of the jury when it advised the jury that they could consider the contents of the telephone conversation in determining whether to convict for computer solicitation. Grohs argues that the trial court's instruction took the determination of an essential element of the crime charged away from the jury and directed a verdict for the State. For the reasons that follow, we agree with appellant that the trial court's instruction was improper and reverse.

A trial court's response to a jury question shall be reviewed according to the abuse of discretion standard. *Toro v. State*, 712 So. 2d 423 (Fla. 4th DCA 1998). The "issue of whether and what supplemental instructions should be given to the jury lies entirely within the discretion of the trial court." *Perriman v. State*, 707 So. 2d 1151, 1152 (Fla. 3d DCA 1998) (citing *Henry v. State*, 359 So. 2d 864, 866 (Fla. 1978)). However, while we recognize that the trial court is afforded discretion in answering jury questions concerning statutory interpretation, there are rules of statutory construction to which the trial court must adhere. For example, the rule of lenity requires that criminal statutes "be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." *State v. Burris*, 875 So. 2d 408, 415 (Fla. 2004) (citing section 775.021(1), Florida Statutes (2002)).

Because section 847.0135(3) is susceptible of differing interpretations, the rule of lenity required the trial court to apply the interpretation most favorable to the accused. *Burris*, 875 So. 2d at 415. The most favorable interpretation for the defendant would require that the solicitation occur directly on the computer in order to violate the statute. However, the trial court adopted an interpretation that was least favorable to the defendant. By answering the jury's question in the affirmative, the trial court essentially instructed the jury that it could find that the defendant "utilized a computer on-line service" in violation of section 847.0135(3) if the defendant provided his phone number in an e-mail and subsequently engaged in solicitous phone conversations with the victim, even though no solicitation occurred on the computer.

In sum, we conclude the trial court erred in denying the defense's motion for judgment of acquittal. The State clearly failed to prove that any solicitation actually occurred on the computer. The only solicitation prohibited by section 847.0135(3) is that which occurs by use of a "computer on-line service, internet service, or local bulletin board service." Based on the rule of lenity, we reject a broad interpretation that would expand the scope of the term "utilize a computer on-line service" to include phone conversations that arose as a result of a phone number provided through a computer on-line service. Consequently, we reverse and remand for further proceedings consistent with this opinion.

Reversed and Remanded.

GUNTHER and FARMER, JJ., concur.
TAYLOR, J., dissents with opinion.

TAYLOR, J., dissenting.

I respectfully dissent. I think the trial judge correctly denied appellant's motion for judgment of acquittal and properly advised the jury on the law applicable to using computer services to seduce, lure or entice a minor into committing an illegal act under section 847.0135, Florida Statutes. The state presented sufficient evidence, in the form of e-mail exchanges, chat room discussions, and telephone conversations, to establish appellant's attempts to seduce a child he believed to be fifteen years old to commit a sexual act. Further, the trial court appropriately responded to the jury's question of law regarding their ability to consider all evidence before them in determining appellant's guilt.

* * *

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Hubert R. Lindsey, Judge; L.T. Case No. 02-9638 CFA02.

Carey Haughwout, Public Defender, and Ellen Griffin, Assistant Public Defender, West Palm Beach, for appellant.

Charles J. Crist, Jr., Attorney General, Tallahassee, and Katherine Y. McIntire, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.