

THE STATE OF SOUTH CAROLINA  
In the South Carolina Court of Appeals

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**APPEAL FROM RICHLAND COUNTY**  
Court of General Sessions

R. Knox McMahon, Circuit Court Judge

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CASE NO: 2016-001831

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FEB 2 2017  
SC Court of Appeals

The State of South Carolina, ..... Respondent.

v.

Timothy Alan Oertel..... Appellant.

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**INITIAL REPLY BRIEF OF APPELLANT**

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Rock Hill, SC 29732  
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Attorney for Appellant

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## ARGUMENT

### **A. THE LOWER COURT ERRED IN FAILING TO DIRECT A VERDICT ON THE INDICTMENTS OF ATTEMPTED DISSEMINATION OF OBSCENE MATERIAL TO A PERSON UNDER THE AGE OF EIGHTEEN.**

The Appellant did not disseminate obscene material to a person under the age of eighteen (18). The Appellant disseminated obscene material to a person over the age of eighteen (18) who was holding herself out to be under the age of eighteen (18). The State's position is that the Appellant should have thought that the person who was not under the age of eighteen (18) really was under the age of eighteen (18). The Brief of the Respondent states that the Appellant knew or should have known that, "Emmy Robinson" was under the age of eighteen (18). "Should have known" does not satisfy the element of the intent in an attempt case. There must be the specific intent to engage in the conduct or to receive the result prescribed of the substantive criminal offense. State v. Ready, 96 S.E.2d 287, 110 S.C. 177 (1918) In order to convict the Appellant of attempted dissemination of obscene material to a person under the age of eighteen (18), the State is required to prove that the Appellant thought that the person to whom he disseminated the obscene material to was under the age of eighteen (18).

One cannot attempt to commit an act that cannot be committed unless one thinks he is committing the actual act. The Appellant could not have attempted to disseminate obscene material to a minor if he thought the minor was over the age of eighteen (18) and the person was actually over the age of eighteen. The present case differs from the case of Feldman v. S.C. Tax Comm'n, 203 S.C. 49, 26 S.E.2d 22 (1943). In the Feldman case the Defendant actually sold alcoholic beverages to a minor. Feldman was not an attempt

case. In Feldman the Court held that the requirement of knowingly was satisfied when the Defendant has information from appearance or otherwise it would lead a prudent man to believe that he was dealing with a minor. If the Appellant had actually disseminated obscene material to a minor then the element may be satisfied. The element of intent is not present in this case.

**B. THE COURT ERRED IN FAILING TO DIRECT A VERDICT ON THE INDICTMENT OF CRIMINAL SOLICITATION OF A MINOR.**

The discussions between the Appellant and Emmy Robinson were discussion concerning what they would do if they were together. There was never any arrangements for them to actually meet. The discussions between them do not rise to the level of solicitation.

There was no discussion of the Appellant and Emmy Robinson having any sexual contact after the point that Appellant realized she was claiming to be a minor.


**C. THE COURT ERRED IN FAILING TO DIRECT A VERDICT ON THE INDICTMENT OF ATTEMPTED SEXUAL EXPLOITATION OF A MINOR FIRST DEGREE.**

The Respondent argues that it was reasonable for a rational juror to find that the Appellant sought Emmy Robinson to produce material containing photos of her naked to send to him. The State was required to prove that the Appellant encouraged Emmy Robinson to appear in a state of sexual explicit nudity to produce material. Although the Appellant arguably requested Emmy Robinson to send nude pictures of her to him, he did not mention anything about producing pictures. It was speculation as to whether Emmy Robinson would have to produce pictures or whether she already had pictures to send him. The State failed to show the elements of attempted sexual exploitation of a minor.

**CONCLUSION**

For all the foregoing reasons the Appellant requests that this case be reversed.

Respectfully Submitted,

  
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September 28, 2017

THE STATE OF SOUTH CAROLINA  
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v.

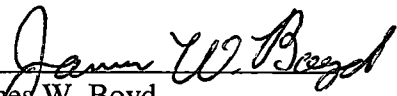
Timothy Alan Oertel..... Appellant.

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PROOF OF SERVICE

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I, James W. Boyd, certify that I served on September 28, 2017, the within Initial Reply Brief of Appellant on Respondent by depositing a copies of the same in the United States mail, postage prepaid, addressed to South Carolina Attorney General's Office, Rembert C. Dennis Building, PO BOX 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule 208 to be served have been served.

  
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September 28, 2017

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September 28, 2017

The Honorable Jenny Abbott Kitchings  
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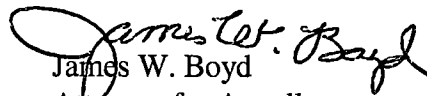
RE: State v. Timothy Alan Oertel  
CASE NO; 2016-001831

Dear Ms. Kitchings:

Enclosed is the original Initial Reply Brief of Appellant and a Proof of Service for the above-entitled matter. Thank you for your attention to this matter.

With kind regards, I am

Sincerely,

  
James W. Boyd  
Attorney for Appellant

JWB/klc

Enclosures

cc: South Carolina Attorney General's Office



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