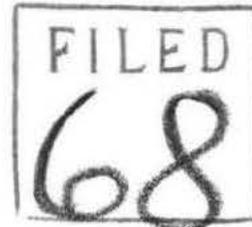


LEWDNESS:  
COHABITATION:  
CRIMINAL LAW:  
EVIDENCE:

An unmarried man and woman, who are living together and holding themselves out as husband and wife can be prosecuted for open, gross lewdness or lascivious behavior under Section 563.150, RSMo 1959, only if there were direct or circumstantial evidence of sexual relations.

September 13, 1961



Honorable Clarence H. Overbay, Jr.  
Prosecuting Attorney  
Dunklin County  
Kennett, Missouri

Dear Mr. Overbay:

This is in reply to your opinion request of July 1, 1961, wherein you ask if Section 563.150, RSMo 1959, includes two unmarried persons who are living together and holding themselves out as husband and wife but who have not been seen by witnesses committing any wrongful act?

Section 563.150, RSMo 1959, states, in part, as follows:

" . . . and every person, married or unmarried, who shall be guilty of open, gross lewdness or lascivious behavior, or of any open and notorious act of public indecency, grossly scandalous, shall, on conviction, be adjudged guilty of a misdemeanor."

In *Adams v. Commonwealth*, 162 Ky. 76, 171 S. W. 1006, the Kentucky Court of Appeals stated:

"In *Roberson's Criminal Law*, vol. 2, p. 830, it is said: 'Open and gross lewdness, or whatever openly outrages decency and is injurious to public morals, is a misdemeanor and indictable at common law. Thus the living together of a man and woman unmarried, which is generally known throughout the neighborhood, is sufficient to constitute open and notorious lewdness, without proving it to have been in a street or under

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the immediate observation of strangers.' "

In State v. McGehee, 308 Mo. 560, 274 S. W. 70, the Court in discussing Section 3513, RSMo 1919 (which was identical to Section 563.150, RSMo 1959) stated:

"In order to be guilty of the violation of Section 3515 by persons unmarried, they must be guilty of living together in open and notorious manner, or be guilty of open, gross lewdness. The statute is violated by any person married or single where the immoral act is open and notorious."

In State v. Bess, 20 Mo. 420, John Bess and Polly Bess (alias Polly Cox) were charged by indictment with living "in a state of open and notorious adultery, and did then and there lewdly and lasciviously abide and cohabit with each other; and was then and there guilty of open, gross lewdness and lascivious behavior, by then and there publicly, lewdly and lasciviously abiding and cohabiting with each other, contrary, . . ."

Although declaring the indictment insufficient in regard to the charges of (1) living in a state of open and notorious adultery, and (2) lewdly and lasciviously abiding and cohabiting with each other because the indictment did not allege and charge that either defendant was married and not to each other, the court stated:

"But there is a third clause of this section, in which it is provided against those persons, married or unmarried, who shall be guilty of open, gross lewdness or lascivious behavior. . . . The indictment, however, contains a third charge, and it is stated correctly under the statute. After setting forth the two charges, as noticed above, it proceeds thus: 'And were then and there guilty of open, gross lewdness and lascivious behavior, by then and there publicly, lewdly and lasciviously abiding and cohabiting with each other.' Here we find an offense sufficiently charged

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in the indictment, and sufficiently described under the statute. What act can be more grossly lewd or lascivious than for a man and woman, not married to each other, to be publicly living together, and cohabiting with each other? . . . The offense charged is an act of open, gross lewdness and lascivious behavior. The manner in which the offense is perpetrated is by the defendants publicly, lewdly and lasciviously cohabiting together."

See, also, State v. Hopson, 76 Mo. App. 483; see, also, State v. Chandler, 33 S.W. 797, 132 Mo. 155.

Thus, it is clear from the foregoing authorities that an unmarried man or woman, who are living together and holding themselves out as husband and wife would be in violation of the quoted portion of Section 563.150, RSMo 1959, only if there were direct or circumstantial evidence of sexual relations. As stated in State v. Crowner, 56 Mo. 147, l.c.150:

"The statute was intended to provide against persons who in defiance of morality and of the good or well-being of society should openly live together; they must reside together publicly in the face of society as if the conjugal relation existed between them, their illicit intercourse must be habitual."

In State v. Pedigo, 176 S. W. 556, l.c. 558, the Court used this language:

"Yet, what is meant by living and cohabiting together necessarily implies, and the jury must find, that acts of sexual intercourse take place, but no court would require the jury to find that some person actually saw such acts take place."

However, because of the peculiar nature of the crime, it may be proven in its entirety by circumstantial evidence rather than direct evidence.

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In State v. Stout, 198 S. W. 2d 364, defendants appealed a conviction of unlawfully, lewdly and lasciviously abiding and cohabiting with each other, and then and there habitually having sexual intercourse with each other. Although there was no direct testimony of sexual intercourse between the defendants, the testimony tended to show that defendants during the time alleged in the information ate their meals together; that Stout bought the groceries and paid the rent; that they occupied the same bedroom and were seen in bed together on numerous occasions.

The Springfield Court of Appeals, in holding that the evidence was sufficient to sustain the conviction, stated, l. c. 367:

"The crime charged by the information in the case at bar is not established by a single act or by the conduct of a single day but by continuing acts and conduct over a period of time of more or less duration. Much of the evidence is circumstantial but it proves circumstances from which other circumstances are deductible which tend to establish the guilt of the defendants. This character of evidence is admissible, and especially so on the trial of an offense as here charged, the proof of which in the majority of cases, the state must rely almost exclusively, if not wholly, upon circumstantial evidence. Moreover, when a fact is to be established by circumstantial evidence, all surrounding circumstances are proper to be considered by the jury if they have any bearing on the ultimate fact sought to be established. It is not necessary to prove by direct evidence the charge alleged in the information. It may be done entirely by circumstantial evidence."

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CONCLUSION

It is, therefore, on the basis of the foregoing, the conclusion of this office that an unmarried man and woman, who are living together and holding themselves out as husband and wife can be prosecuted for open, gross lewdness or lascivious behavior under Section 563.150, RSMo 1959, only if there were direct or circumstantial evidence of sexual relations.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON  
Attorney General

GWD lc