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IN THE COURT OF APPEALS OF INDIANA

KEVIN HOLLOWAY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0911-CR-649
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Richard Sallee, Senior Judge
Cause No. 49G22-0801-FC-008031

June 29, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Kevin Holloway ("Holloway") was convicted in Marion Superior Court of Class C felony child solicitation. Holloway appeals and raises two issues, which we restate as:

> I. Whether the trial court abused its discretion when it excluded the testimony of the defendant's witness; and,
>
> II. Whether the evidence was insufficient to support Holloway's child solicitation conviction.

We affirm.

Facts and Procedural History

In October 2007, Indianapolis Metropolitan Police Department Officer Darren Odier created a Yahoo profile with the screen name of "BoardBoy2007" for the purpose of investigating online child solicitation. BoardBoy2007's profile stated that his name was Josh and that he was fifteen years old.

On October 22, 2007, Officer Odier entered a Yahoo Indiana chat room using BoardBoy's profile. At 6:47 p.m., "BoardBoy" received an instant message from Holloway, who was using the screen name ReadySetGo21. "BoardBoy" and Holloway chatted for approximately forty minutes, during which "BoardBoy" told Holloway that he was a fifteen-year old male from Indianapolis. Holloway stated that he was a twenty-one-year male from Kokomo. The exchange between "BoardBoy" and Holloway was sexually explicit and included Holloway directing "BoardBoy" to perform sex acts.

On January 10, 2008, Holloway was charged with Class C felony child solicitation. On April 22, 2009, the State filed a motion in limine seeking to exclude the testimony of defense witness Dr. Andrew Barclay. Holloway desired to elicit testimony

from Dr. Barclay about role-playing on the internet. Further, the doctor would have testified that, in his opinion, Holloway did not believe he was chatting with a fifteen-year-old boy. A hearing was held on the motion, and the trial court granted the State's motion in limine on April 27, 2009.

A jury trial commenced on April 28, 2009, and Holloway was found guilty as charged. Holloway was ordered to serve a four year sentence, with two years executed and two years suspended. He was then placed on probation for three years and his executed time was stayed unless he violated his probation. Holloway now appeals. Additional facts will be provided as necessary.

I. Dr. Barclay's Excluded Testimony

The decision to admit or exclude expert testimony is entrusted to the sound discretion of the trial court, and we will reverse only for abuse of that discretion. Ritchie v. State, 875 N.E.2 706, 728 (Ind. 2007) (citing Williams v. State, 706 N.E.2d 149, 163 (Ind. 1999). Evidence Rule 702(a) provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testified thereto in the form of an opinion or otherwise." Expert witnesses may testify concerning their opinions generally, but experts may not testify "'to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.'" Ritchie, 875 N.E.2d at 728 (quoting Ind. Evid. R. 704(b)); see also Carter v. State, 754 N.E.2d 877, 881-82 (Ind. 2001). "And this is so because: (1) legal conclusions are not

helpful to the trier of fact, (2) legal conclusions are reserved solely for the court's determination, and (3) it is the function of the court, not the expert witness, to instruct on the law." Id. at 728-29 (citing 13 Robert Lowell Miller, Jr., Indiana Practice, Indiana Evidence § 704.206, 460 (2d ed. 1995)).

In this case, Holloway sought to introduce the testimony of Dr. Andrew Barclay, a certified psychologist and sexologist. Dr. Barclay was offered as an expert in the area of sexual fantasies and internet role playing. In preparing his testimony for this case, Dr. Barclay reviewed only the charging information, which included the transcript of the chat between Holloway and "BoardBoy," Holloway's interview with police, the photos used for "BoardBoy's" internet profile, and a detective's deposition. Tr. pp. 28, 31. Dr. Barclay did not interview Holloway.

Based on his review of the documents, Dr. Barclay would have testified that Holloway "was engaging in self stimulating behavior for the purposes of creating imagery in his own mind; and that he lifted, if you will, he used imagery that is available, say, in adult videos as part of his self stimulating package." Tr. p. 49. Dr. Barclay also would have testified that, in his opinion, Holloway did not think he was talking to a child. Tr. p. 62.

Dr. Barclay's testimony concerning Holloway's intent in engaging in the chat with "BoardBoy" and whether Holloway believed he was "chatting" with a child was ultimately an opinion concerning Holloway's guilt or innocence of the charged crime. In addition, Dr. Barclay only reviewed documents pertaining to the case and never interviewed the defendant in forming his opinion. Finally, Dr. Barclay admitted his

limited knowledge of internet "chat rooms" and that he had not published any articles or reviewed academic articles concerning the "chat room" internet culture and role playing on the internet. Tr. p. 47. For all of these reasons, we conclude that the trial court acted within its discretion when it excluded Dr. Barclay's testimony.

II. Insufficient Evidence

Holloway also argues that the evidence is insufficient to support his Class C felony child solicitation conviction. When we consider a challenge to the sufficiency of evidence to support a conviction, we respect the jury's exclusive province to weigh the evidence and therefore neither reweigh the evidence nor judge witness credibility. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the conviction, and "must affirm 'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" Id. (quoting Tobar v. State, 740 N.E.2d 109, 111-12 (Ind. 2000)).

To convict Holloway of Class C felony child solicitation, the State was required to prove that Holloway, who was at least twenty-one years old, knowingly or intentionally solicited an individual using a computer network, that Holloway believed to be a child at least fourteen (14) years of age but less than sixteen (16) years of age, to engage in sexual intercourse, deviate sexual conduct, and or any fondling or touching intended to arouse or satisfy the sexual desires of either Holloway or the individual Holloway believed to be a child fifteen years of age. See Ind. Code § 35-42-4-6 (2004 & Supp. 2009); Appellant's

App. p. 22. Holloway argues that the State failed to prove that Holloway believed he was "chatting" with a fifteen-year-old child.

Officer Odier's screen name was "BoardBoy2007," and the officer told Holloway that he was fifteen years old. The profile the officer created included a picture of a boy, who appears to be in his teenage years. Ex. Vol., State's Ex. 1. During their chat, "BoardBoy" told Holloway that he had engaged in only one other sexual experience with a seventeen-year-old boy that he knew from school. "BoardBoy" also stated that he had an older brother at IU. See generally Ex. Vol., State's Ex. 4. Holloway's argument that he believed that "BoardBoy" was older than fifteen is simply a request to reweigh the evidence and the credibility of the witnesses, which our court will not do. Accordingly, we conclude that the evidence is sufficient to support Holloway's Class C felony child solicitation conviction.

Conclusion

The trial court did not abuse its discretion when it excluded Dr. Barclay's testimony, and the evidence is sufficient to support Holloway's Class C felony child solicitation conviction.

Affirmed.

RILEY, J., and BRADFORD, J., concur.