

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHAN AARON CERVI,

Defendant-Appellant.

UNPUBLISHED

July 15, 2010

No. 292600

Wayne Circuit Court

LC No. 04-008607-FH

Before: O'CONNELL, P.J., and METER and OWENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of using a computer to communicate with a perceived minor for the purpose of attempting or committing third degree criminal sexual conduct, MCL 750.145d(2)(f). Defendant was sentenced to two years' probation and ordered to register as a sex offender. Defendant appeals as of right. We affirm.

Defendant's conviction arose following a series of online discussions that occurred over the course of several days between July 1, 2003 and July 7, 2003. Defendant, using the screen names Tommyd683 and Cerv 25, approached an individual using the screen name Inozentangel, whom defendant understood to be a 14-year-old female, and engaged in graphic sexual discussions, which culminated in a planned meeting at an area high school of the purpose of obtaining fellatio. "Inozentangel" was actually a fictitious profile created by a member of the Wayne County Sheriff's Department. When defendant arrived at the meeting place, he was arrested.

This matter has had a complicated procedural history. Following defendant's arrest, he was initially charged with two counts of using the internet to commit or attempt to commit third-degree criminal sexual conduct, contrary to MCL 750.145d(2)(f), and one count of using the internet to commit or attempt to commit child sexually abusive activity, also contrary to MCL 750.145d(2)(f). At the preliminary hearing, the magistrate bound defendant over on count one only, determining that the chats were a single continuing offense and the police had not recovered equipment with which to produce child sexually abusive materials. Thereafter, this Court granted leave to appeal, and issued the published decision, *People v Cervi (Cervi I)*, 270 Mich App 603, 626; 717 NW2d 356 (2006), reversing the trial court's denial of plaintiff's motion to reinstate counts two and three and remanding the matter for further proceedings.

On remand, defendant moved for an abandonment instruction, which the trial court granted. Plaintiff sought leave to appeal. In lieu of granting plaintiff's application, this Court issued a peremptory order reversing the trial court and ruled that defendant could not raise the defense of abandonment at trial. *People v Cervi (Cervi II)*, unpublished order of the Court of Appeals, entered July 23, 2007 (Docket No. 276927). Our Supreme Court denied leave to appeal that order. *People v Cervi (Cervi III)*, 480 Mich 1002; 742 NW2d 353 (2007). Thereafter, the matter proceeded to a jury trial and defendant was convicted as noted above, but acquitted of a second count of using a computer to communicate with a perceived minor for the purpose of attempting or committing third-degree criminal sexual conduct, as well as one count of using a computer to communicate with a perceived minor for the purpose of attempting or committing child sexually abusive activity.

Defendant first argues that there was insufficient evidence presented to support his conviction. We disagree.

In reviewing a sufficiency of the evidence claim, an appellate court must apply a de novo standard of review. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). Issues of a statutory interpretation are reviewed de novo. *People v Idziak*, 484 Mich 549, 554; 773 NW2d 616 (2009).

Due process requirements prohibit a criminal conviction unless the prosecution establishes guilt of the essential elements of a criminal charge beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). A reviewing court must examine the evidence in a light most favorable to the prosecution, and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond reasonable doubt. *Hawkins*, 245 Mich App at 457. Circumstantial evidence and the reasonable inferences it engenders are sufficient to support a conviction, provided the prosecution meets its burden of proof. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). All conflicts in the evidence must be resolved in the favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

In *Cervi I*, we set forth the elements that must be established beyond a reasonable doubt for a conviction under the circumstances of this case as follows: (1) use of the Internet or a computer, (2) intent to attempt to commit conduct proscribed by § 520d (sexual penetration of a person between the ages of 13 and 16), and (3) belief that the intended victim is a minor. *Cervi I*, 270 Mich App at 617.

Evidence was presented below establishing that defendant, over the course of several days, contacted an individual he believed to be a 14-year-old girl via chat room and instant messaging service, engaged in graphic sexual discussions, forwarded a picture of his penis, and made arrangements to meet for the purpose of receiving fellatio. Thus, the first and third elements were clearly satisfied. Moreover, the jury could reasonably infer from defendant's communications, including repeated requests that "Inozentangel" sneak out to meet him for sexual purposes, that the prosecution had proven the second element. Admittedly, defendant did testify that he never intended to have sex with a minor when he went onto the Internet. However, the jury's verdict indicates that it did not find this testimony credible. "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of the witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

Defendant points out that he did not bring a webcam, towels, or condoms with him to the proposed rendezvous and only entered the driveway rather than the parking lot where the meeting was to occur. This Court has already specifically rejected defendant's argument that the prosecution was required to present evidence of an overt act on defendant's part that he actually attempted to sexually penetrate a minor. *Cervi I*, 270 Mich App at 618-619. Therefore, the crime was completed when the circumstances met the three elements identified above. There was no need for the prosecution to prove that the defendant then took steps to accomplish the intended conduct proscribed by § 520d. Thus, the facts that defendant never entered the parking lot at the arranged meeting place and had not brought with him certain items that had been discussed in the online discussion have no bearing on whether there was sufficient evidence to support his conviction.

In sum, taken as a whole and viewed in a light most favorable to the prosecution, the evidence presented below and the reasonable inferences stemming from that evidence were sufficient to support defendant's convictions. *Hawkins*, 245 Mich App at 457.

Defendant next argues that the trial court erred in ordering him to register as a sex offender. We disagree.

The construction and application of the Sex Offender Registration Act (SORA), MCL 28.721 *et seq.*, is a question of law this Court reviews de novo. *People v Golba*, 273 Mich App 603, 605; 729 NW2d 916 (2007). Under SORA, an individual convicted of a listed offense after October 1, 1995, is required to register as a sex offender. MCL 28.723(1)(a); *People v Anderson*, 284 Mich App 11, 13; 772 NW2d 792 (2009). Defendant initially argues the trial court incorrectly concluded that his conviction constituted a "listed offense." We disagree.

A "listed offense" is a defined term that includes numerous specifically identified statutes. MCL 28.722(e)(i-x). The definition of "listed offense" also includes a catch-all provision, identified as "[a]ny other violation of a law . . . that by its nature constitutes a sexual offense against an individual who is less than 18 years of age." MCL 28.722(e)(xi). The trial court in this case determined that defendant's conviction constituted a "listed offense" under the catch-all provision of the statute. The determination whether a defendant must register as a sex offender under the catch-all provision must be made on a case-by-case basis. *People v Meyers*, 250 Mich App 637, 650; 649 NW2d 123 (2002). In addition, the determination whether an offense is inherently sexual should be made by looking at the "unique nature of the criminal conduct underlying the charge." *Id.* at 649.

We find that our decision in *Meyers* is instructive to the determination of whether defendant's conviction in the instant case satisfies SORA's catch-all provision. The instant case is substantially similar to that of *Meyers*, where the defendant in that case engaged in graphic sexual discussions of oral sex with an individual he believed to be a minor, but was actually an undercover officer. *Meyers*, 250 Mich App at 649.

There is no dispute that defendant's conviction satisfies the first requirement of the catch-all provision. In addition, the *Meyers* court stated that there could be "no question" that the underlying conduct of engaging in an online discussion involving graphic discussions of oral sex was by its nature sexual. *Id.* Therefore, the same conduct in the instant case can be classified as

inherently sexual. Likewise, the *Meyers* Court also rejected the defendant's argument in that case that he could not be required to register as a sex offender because the "underage minor" he had been communicating with was actually an undercover police officer. *Id.* at 655. As a result, defendant's identical argument in the instant case should fail. Accordingly, defendant's conviction satisfies each of the catch-all requirements, and thus qualifies as a listed offense.

Defendant argues in the alternative that the trial court improperly ordered him to register as a sex offender because statements made at the sentencing hearing demonstrate that it did not consider him an ongoing threat. Defendant specifically asserts that the trial court was required to make a two-fold determination that defendant posed a potential danger and that SORA provided an appropriate, comprehensive, and effective means to monitor him before it could order him register as a sex offender. This claim is without merit.

MCL 28.721a sets forth that the Legislature has already determined that any person "who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state." Moreover, MCL 28.723 requires each person convicted of a listed offense to register. Neither of these SORA provisions allow for discretionary determinations on the part of the trial court. Thus, having determined that defendant's conviction constitutes a listed offense, this fact alone necessitates the conclusion that he poses an ongoing threat and must register. Accordingly, the trial court correctly determined that defendant must register as a sex offender.

Affirmed.

/s/ Peter D. O'Connell
/s/ Patrick M. Meter
/s/ Donald S. Owens