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IN THE
COURT OF APPEALS OF INDIANA

TIMOTHY CUNNINGHAM,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0804-CR-319
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Ted Robinette, Master Commissioner
Cause No. 49G03-0707-FC-144447

October 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Timothy Cunningham appeals his conviction, after a bench trial, of child solicitation as a class C felony.

We affirm.

ISSUE

> Whether sufficient evidence of Cunningham's intent to solicit a minor (to engage in sexual intercourse or deviate sexual conduct, or any fondling or touching to arouse his or the minor's sexual desires) sustains his conviction of child solicitation as a class C felony.

FACTS

In March of 2007, Detective Darin Odier was engaged in an investigation of sexual predators on the internet and created a profile on Yahoo! for Jamie Losh. The profile indicated that the age of Jamie Losh was fifteen and included a photograph of what appears to be a young girl. During an exchange of instant messages in a Yahoo! Chat room, "the dialogue box for the recipient of" a message from "jamielosh" would "show Jamie Losh's photograph that was contained in the profile." (Tr. 159).

Using the "jamielosh" identity, on the evening of March 27, 2007, Odier signed on the Yahoo! Messenger service and entered a chat room specific to Indiana. Cunningham, using the screen name "funguy50002004" ["funguy"], sent an instant message to "jamielosh" saying, "very pretty and sexy." (Tr. 166). The responding message asked

ASL"[1]; "funguy" answered "male 20 to [sic] old darn it Bloomington," and "jamielosh" responded "15 f indy." (Ex. 4).

As "funguy," Cunningham then messaged "jamielosh" that she was "hot" and asked if she was "built as nice as it looks." *Id.* He expressed the desire to "kiss [her] all over," asked whether she "ever had sex," and stated, "i might hurt you im big" – "10 inches," but that she "would like it once it was in." *Id.* He asked her bra size and expressed a desire to "suck on" her breasts and "see them" bare. *Id.* He stated he would "love to eat [her] sweet tight p*ssy" and "suck on [her] hot cl*t . . . ." *Id.* He asked whether "jamielosh" had "thought about" performing fellatio and stated that he thought she would be "good at [it]." *Id.* Cunningham asked what "jamielosh" was wearing and whether she masturbated; then encouraged her to do so during a series of additional messages. He stated a desire to engage in sexual intercourse and promised he "would be slow and easy." *Id.* He asked where her mother was, and when "jamielosh" answered, "at work till 11," he answered, "if I were there id get you naked suck on your cl*t till you got off then slip it in you slowly." *Id.* He "wish[ed] [his] tongue was in [her]" and that "it was [his] c*ck in her." *Id.* After more than an hour of exchanging such sexually explicit messages with "jamielosh," he asked whether she "want[ed] company some evening" and closed by saying "later." *Id.*

On July 20, 2007, the State charged Cunningham with one count of child solicitation, as a class C felony. The charging information alleged that Cunningham,

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[1] Odier testified that this "is short for age, sex, location." (Tr. 30).

> a person at least twenty-one (21) years of age, did, by use of a computer network, knowingly solicit an individual . . . Cunningham believed to be . . . fifteen (15) years of age, to engage in sexual intercourse and/or deviate sexual conduct.

(App. 31). At a bench trial on December 13, 2007, and January 25, 2008, the above facts were provided in Odier's testimony and the transcript of the March 27, 2007, instant message chat between "jamielosh" and "funguy." During cross-examination, Odier acknowledged that the profile he created for "jamielosh" inadvertently stated that it was an "adult profile." (Tr. 180).

Also admitted into evidence was Cunningham's voluntary recorded statement to Odier. Therein, Cunningham stated that he was born in 1950. He acknowledged that at the outset of the chat, "jamielosh" had messaged him that she was "15 f indy,"[2]; and he expressly described his early messages as "sexually explicit." (Ex. 8, 9). Cunningham also acknowledged that he had looked at the profile for "jamielosh" before he sent the first message; stated that "she looked too young to [him]"; and admitted that the photograph on the "jamielosh" profile "looks 14 to 15 years old." *Id.*

The trial court took the matter under advisement, to listen to Cunningham's recorded statement and to read the transcript of the instant message chat. On February 8, 2008, it found Cunningham guilty as charged and entered judgment of conviction on child solicitation as a class C felony. On March 4, 2008, the trial court sentenced him to three years, with three years suspended.

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[2] In his statement, Cunningham indicated that he understood "ASL" meant "age, sex, location." *Id.*

DECISION

When reviewing the sufficiency of the evidence to support a conviction,

> we consider only the probative evidence and reasonable inferences *supporting* the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted, emphasis in original).

The statute provides that a person "at least twenty-one years of age or older," who "knowingly or intentionally solicits . . . an individual the person believes 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; or any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person," commits a class C felony "if it is committed by using a computer network." Ind. Code § 35-42-4-6(c). Further, "'solicit' means to command, authorize, urge, incite, request, or advise an individual . . . by using a computer network." I.C. § 35-42-4-6(a). The State "is not required to prove that the person solicited the child to engage in an act described in subsection . . . (c) at some immediate time." I.C. § 35-42-4-6(d).

Cunningham argues that the evidence is insufficient to prove that he knowingly[3] solicited a child because Odier "mistakenly created an adult profile thereby allowing Cunningham to believe he was chatting with another adult." Cunningham's Br. at 7. He then distinguishes the facts in his case from those in *Laughner v. State*, 769 N.E.2d 1147 (Ind. Ct. App. 2002), *trans. denied*, *cert. denied* 538 U.S. 1013 (2003); *LaRose v. State*, 820 N.E.2d 727 (Ind. Ct. App. 2005); and *Kuypers v. State*, 878 N.E.2d 896 (Ind. Ct. App. 2008); and asserts that his "conviction should be overturned because of its unique factual circumstances that lawfully support a mistake of mistake defense and or alternatively disprove the essential elements of knowingly or intentionally solicits a child." Cunningham's Br. at 10.

We agree that the facts here are not identical to those of the cited cases, but Cunningham fails to enlighten us as to the "mistake of mistake defense." *Id.* Further, as noted above, he was not charged with having intentionally solicited a child. Finally, he presents no analysis to support his bald assertion that the circumstances "disprove the essential element of knowingly" soliciting a child. *Id.*

"A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." I.C. § 35-41-2-2(b). "Because knowledge is the mental state of the actor, it may be proved by circumstantial evidence and inferred from the circumstances and facts of each case." *Wilson v. State*, 835 N.E.2d 1044, 1049 (Ind. Ct. App. 2005), *trans. denied*.

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[3] Cunningham asserts that the State failed to prove that he "knowingly or intentionally solicited a child . . . ." Cunningham's Br. at 7. However, the charging information alleged that he did "knowingly solicit an individual . . . ." (App. 31).

We acknowledge that at one place on the profile for "jamielosh," it indicates "adult profile." Nevertheless, after "funguy" sent a message to "jamielosh" saying "very sexy and pretty," the reply – which would have shown the profile photograph in the dialogue box on Cunningham's computer screen – asked "funguy" his age, sex, and location. (Tr. 166). He replied that he was "20 to [sic] old," (Ex. 4), an answer supporting the inference that Cunningham believed "jamielosh" was a child. Further, in reply to "funguy"'s response, "jamielosh" stated "15 f indy." (Ex 4). Thus, that "jamielosh" was not an adult but a fifteen-year-old child was expressly conveyed to Cunningham, and it was after this that he proceeded to send a series of salacious messages concerning sexual activity to "jamielosh." Many of these messages support the inference that Cunningham believed "jamielosh" was age fifteen – asking about her mother, presuming her sexual inexperience. Moreover, in his own statement, Cunningham admitted that he had looked at the picture before sending the first message to "jamielosh," and that she "looked too young" to him, "14 to 15 years old." (Ex. 8, 9).

The evidence supports the trial court's inference that Cunningham believed "jamielosh" to be a fifteen-year-old child and knowingly solicited her to engage in sexual intercourse and deviate sexual conduct.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.